84-1321 (1)

Office - Supreme Court, U.S.
FILED
FEB 15 1985
ALEXANDER L. STEVAS,
CLERK

No. .....

In The

Supreme Court of the United States

October Term, 1984

—o—

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

—o—

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5166

THOMAS D. MCGRANE
Assistant Attorney General

February 15, 1985

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTIONS PRESENTED

1. Whether criminal defense lawyers provide ineffective assistance of counsel by persuading their client not to commit perjury at his trial when their successful effort to prevent him from lying on the stand wins unanimous praise from the state supreme court and the conduct of the attorneys does not prejudice their client at trial.

2. Whether criminal defense lawyers, who, as officers of the court, admonish their client that they will take steps necessary to prevent him from committing perjury, violate their client's right to testify when the client subsequently abandons the perjury scheme and takes the stand in his own defense.

3. Whether criminal defense lawyers, who privately and confidentially persuade their client not to commit perjury on the stand, act in a fashion which causes a violation of their client's right to due process of law when the judge and jury at his state court trial are not informed of the defendant's abandoned perjury plan.

4. Whether a federal Court of Appeals should use federal habeas corpus as a vehicle for resolving a dispute of legal ethics that has divided the bar for many years in order to reverse a state court criminal conviction where the fact-finding process of the state court proceeding has not been impugned.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINION BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I. THE INEFFECTIVE ASSISTANCE OF COUNSEL HOLDING OF THE FEDERAL COURT OF APPEALS THREATENS TO UNDERMINE THE STABILITY AND RELIABILITY OF THE FACT-FINDING PROCESS AT STATE CRIMINAL TRIALS	7
II. THE UNPRECEDENTED ALTERNATE HOLDING OF THE COURT OF APPEALS THAT A CONSTITUTIONAL "RIGHT TO TESTIFY" IS VIOLATED WHEN AN ATTORNEY INFORMS A CLIENT THAT THE ATTORNEY WILL WITHDRAW OR ADVISE THE COURT IF THE CLIENT PERSISTS IN A PERJURY SCHEME SERIOUSLY UNDERMINES ESTABLISHED PRINCIPLES OF PROFESSIONAL ETHICS	14
III. THE PANEL'S VAGUE HOLDING THAT WHITESIDE'S ATTORNEYS VIOLATED DUE PROCESS OF LAW PROVIDES NO GUIDANCE FOR LOWER COURTS OR LAWYERS	16
IV. THE INEFFECTIVE ASSISTANCE OF COUNSEL / RIGHT TO TESTIFY / DUE	

TABLE OF CONTENTS—(continued)

Page

PROCESS HOLDINGS OF THE COURT OF APPEALS ESTABLISH AN UNWORKABLE FRAMEWORK THAT LEAVES DEFENSE COUNSEL WITH NO ACCEPTABLE OPTIONS WHEN CONFRONTED WITH A PERJURY-DETERMINED CLIENT ON THE EVE OF TRIAL 17

CONCLUSION 21

APPENDIX A1

TABLE OF AUTHORITIES

CASES:

Cuyler v. Sullivan, 446 U.S. 335 (1980) 11, 12

Engle v. Isaac, 456 U.S. 107 (1982) 8

Faretta v. California, 422 U.S. 806 (1975) 14

Harris v. New York, 401 U.S. 222 (1971) 12, 15

Herring v. New York, 422 U.S. 853 (1975) 20

Hutter Northern Trust Co. v. Door County Chamber of Commerce, 467 F.2d 1075 (7th Cir. 1972) 19

In re Branch, 70 Cal. 2d 200, 74 Cal. Rptr. 238, 449 P.2d 174 (1969) 19

Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978) 16, 17

Morris v. Slappy, — U.S. —, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) 17

People v. Lewis, 75 Ill. App. 560, 393 N.E.2d 1380 (1979) 9

State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970) 9

State v. Whiteside, 272 N.W.2d 468 (Iowa 1978) 2, 6, 9

TABLE OF AUTHORITIES—Continued

Pages

Strickland v. Washington, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 6, 7, 8, 11, 13

United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977) 10

United States v. Cronic, — U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) 18

United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984) 15

United States v. Grayson, 438 U.S. 41 (1978) 13

United States v. Petras, 592 F.2d 525 (9th Cir. 1979), *cert. denied* 442 U.S. 910 (1979) 10

Wainwright v. Sykes, 433 U.S. 72 (1977) 8

Wright v. Estelle, 572 F.2d 1071 (5th Cir. 1978) (en banc), *cert. denied* 439 U.S. 1004 (1978) 14, 15

CONSTITUTIONAL PROVISIONS:

Fifth Amendment, United States Constitution 3, 14

Sixth Amendment, United States Constitution 3, 14

Fourteenth Amendment, United States Constitution ... 3

OTHER AUTHORITIES:

28 U.S.C. Section 1243(1) 2

28 U.S.C. Secion 2254(d) 3, 6

ABA/BNA Lawyers' Manual on Professional Conduct (1984) 9

ABA Model Rules of Professional Responsibility Rule 3.3 Comment 19

Fed. R. of Evid. 611 19

TABLE OF AUTHORITIES—Continued

	Pages
Iowa Code of Professional Responsibility	
Canon 4	9
Canon 7	9
Iowa R. of Evid. 611(a)	19
McCormick on Evidence, 2nd Ed. (1972)	19

No. .....

In The

Supreme Court of the United States

October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Crispus Nix, Warden of the Iowa State Penitentiary, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals granting respondent herein a writ of habeas corpus on September 19, 1984 (rehearing en banc denied by a five-four vote on December 24, 1984).

OPINION BELOW

The opinion of the Court of Appeals is reported at 744 F.2d 1323 (8th Cir. 1984) and presented in the Appendix A of this petition for the convenience of the Court. (A1-21) The order denying rehearing en banc is not yet reported but appears as Appendix B. The opinion of the Iowa Supreme Court, *State v. Whiteside*, 272 N.W.2d 468 (Iowa 1978), and the unreported opinion of the United States District Court for the Southern District of Iowa, *Whiteside v. Scurr*, Civil No. 81-246-C (S.D. Iowa 1981), also are included in Appendices C and D (A35-40) (A41-43).

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on September 19, 1984. (A1) On November 13, 1984, United States Supreme Court Associate Justice Harry A. Blackmun entered an order extending the time for filing a petition for writ of certiorari until February 16, 1985. (A44) This petition for certiorari is filed within the time period as extended by Justice Blackmun in his November 13, 1984, order. The Court's jurisdiction is invoked under 28 U.S.C. Section 1243(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law. . . .

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

Fourteenth Amendment, United States Constitution

> No state . . . shall . . . deprive any person of life, liberty, or property without due process of law.

United States Code Title 28, Section 2254(d)

> In any proceeding instituted by a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State Court, a determination after a hearing on the merits of a factual issue . . . shall be presumed correct . . .

STATEMENT OF FACTS

On February 8, 1977, Calvin Love was stabbed to death in connection with a drug transaction in his apartment in Cedar Rapids, Iowa. The state charged Emmanuel Charles Whiteside with the murder of Love. The Iowa District Court originally appointed Thomas M. Horan and Timothy S. White to represent Whiteside. (A46)[1]

---

[1]For the convenience of the Court, excerpts from the record are included in the Appendix to this petition. Full citations to the record have been omitted from the text but may be found in the Appendix.

Whiteside "didn't feel comfortable" with Horan and White because they were former prosecutors (A58), and sought to have Thomas L. Koehler replace them. The problem with this proposal was that an associate in Koehler's law firm had undertaken to represent Derrick Doolin, who was also present at the scene at the time of Love's murder. (A46-48)

Notwithstanding the potential conflict of interest, Whiteside adamantly insisted on representation by Koehler. Only after two court hearings and numerous consultations with White, Horan, and Koehler, was Whiteside finally convinced to accept representation from Gary L. Robinson. (A53)

According to Robinson, Whiteside consistently told his lawyers as they prepared his defense that he did not actually see a gun in Love's possession, but he was nevertheless convinced that Love had a gun. (A79) Robinson conducted a thorough investigation, concluding that Love in fact did not have a gun at the time of the homicide. (A78-32)

About a week prior to trial, Robinson and an associate, Donna Paulsen, were reviewing questions the attorneys had written with Whiteside in preparation for trial. In response to one of the questions at the practice session, Whiteside shocked his lawyers by stating that he intended to testify that he had seen something "metallic" just before he stabbed Love. When Paulsen asked him why he had never mentioned that before, Robinson recalled that Whiteside declared, "If I don't say I saw a gun, I'm dead." (A85)

At a hearing on Whiteside's motion for a new trial, Robinson stated that he responded to the unexpected de-

velopment by explaining to Whiteside that it was not necessary for a gun to be present in order to establish self defense, and that to claim falsely that he actually saw a gun would be perjury. Robinson recalled that he told his client that he and his associate, "as officers of the court, we would be suborning perjury if we allowed him to do it" and admonished him that if he committed perjury that "it would be my duty to advise the Court what he was doing." Robinson also testified that he told his client that if he persisted, he would "ask the court for permission to withdraw" and that he "probably would be allowed to impeach that particular testimony" if Whiteside actually perjured himself on the stand. (A85, 89)

Whiteside himself also testified at the post-trial hearing. He told the court that while he wouldn't say he had a conflict with his attorney over his proposed testimony, "I got the impression at one time that maybe if I didn't go along with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." (A70) Whiteside made no mention of "threats" by Robinson to advise the court or testify against him.

Whatever the character of Robinson's admonitions, Whiteside elected to take the stand and not falsely claim that he actually saw a gun on the person of Calvin Love. The jury convicted him of second degree murder. He then filed a motion for a new trial which alleged, in part, that Robinson provided ineffective assistance of counsel by coercing him to alter his testimony. The state district court found the facts to be as testified by Robinson and denied the motion.

Whiteside appealed to the Iowa Supreme Court, which upheld the conviction. On the issue of Robinson's efforts

to prevent Whiteside from testifying that Love had a gun, the Court affirmed the finding of the trial court that counsel properly refused to be a partner in a dishonest and deceitful scheme. *State v. Whiteside,* 272 N.W.2d 468, 471 (Iowa 1978). (A37)

Whiteside then filed a habeas corpus action in federal court. The district court, accepting the state court's factual finding that Whiteside intended to testify falsely, as required by 28 U.S.C. § 2254(d), dispatched Whiteside's claim with the terse observation that because there is no constitutional right to perjure oneself, Whiteside was not entitled to relief. *Whiteside v. Scurr,* Civ. No. 81-246-C, at 2 (S.D. Iowa 1981). (A43)

The Court of Appeals, however, reversed the district court. While the court also accepted the factual finding of the state court that Whiteside was proposing to testify falsely, 755 F.2d at 1338 (A8), the panel nevertheless held that Whiteside's attorney, through his admonitions to his client, had deprived Whiteside of effective assistance of counsel, due process, and a constitutionally-based right to testify on his own behalf. (A1-21)

The state's suggestion for rehearing en banc was denied by a five to four margin of the Court of Appeals. Judge John R. Gibson, joined by three colleagues, wrote a dissenting opinion which, citing *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), argued that because no prejudice to the petitioner had been demonstrated, the petition for writ of habeas corpus should be denied. *Whiteside v. Scurr,* Slip. Op. 2-5 (Dec. 24, 1984). (A26-30) Judge Fagg, also joined by three judges, wrote in a separate dissent that ineffective assistance of coun-

sel does not occur when an attorney convinces his client to testify truthfully in a criminal proceeding. *Id.*, Slip Op. at 5-9. (A30-34)

The Court of Appeals denied a stay of mandate pending determination of a petition for certiorari to this Court. Upon application by the petitioner and after the filing of a response from the respondent, Justice Blackmun granted a stay pending the timely filing and ultimate disposition of a petition for certiorari by this Court. (A44)

REASONS FOR GRANTING THE WRIT

I. THE INEFFECTIVE ASSISTANCE OF COUNSEL HOLDING OF THE FEDERAL COURT OF APPEALS THREATENS TO UNDERMINE THE STABILITY AND RELIABILITY OF THE FACT-FINDING PROCESS AT STATE CRIMINAL TRIALS.

The ineffective assistance of counsel holding of the Court of Appeals in this habeas corpus proceeding is an intolerable precedent that should be reviewed by this Court in order to avoid immediate and substantial damage to the administration of criminal justice. By obliterating the requirements for ineffective assistance of counsel claims established in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1980), the federal Court of Appeals granted a criminal defendant a new state court trial where the only claim of professional error was that a defendant's lawyers successfully persuaded their client not to commit perjury.

A brief review of *Strickland v. Washington* reveals the scope of the error in the Court of Appeals' approach to the ineffectiveness of counsel issue. In *Strickland,* this Court reemphasized the need to make the trial of the accused the main event in the criminal justice system and the desirability of avoiding what amount to second trials over the effectiveness of counsel in which the defense attorney is the defendant. *Strickland v. Washington,* — U.S. at —, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. *See also Engle v. Isaac,* 456 U.S. 107, 127 (1982); *Wainwright v. Sykes,* 433 U.S. 72, 90 (1977). As a result, this Court articulated a two pronged test for claims of ineffective assistance. First, it must be demonstrated that the identified acts or omissions of counsel were outside the wide range of professionally competent assistance. Second, it must be shown that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington,* — U.S. at —, 104 S.Ct. at 2064-2068, 80 L.Ed.2d at 695-698.

In this case, it is difficult to see that the lawyers did anything wrong at all, let alone committed professional errors that, as apparently found by the Court of Appeals, were so "outside the wide range of professionally competent assistance" as to give rise to a constitutional claim of ineffective assistance of counsel. *Strickland v. Washington,* — U.S. at —, 104 S.Ct. at 2066, 80 L.Ed.2d at 695. The lawyers simply told their client in no uncertain terms that they would have nothing to do with his patently false testimony and that they would actively seek to prevent their client from committing the crime of perjury at trial.

The lawyers' action in this case is entirely consistent with the directions provided to practicing attorneys in the

ABA/BNA Lawyers' Manual on Professional Conduct, a leading desk reference on professional ethics. According to the manual, "A lawyer may not knowingly introduce perjured testimony, whether or not the client is the witness." Moreover, the desk reference further advises lawyers that, while there is a split of authority, "the majority of jurisdictions hold that reasonable remedial measures must be taken" if a client testifies falsely "even if such measures require the disclosure of otherwise confidential information." ABA/BNA Lawyers Manual on Professional Conduct, § 61:401 (1984). *See e.g. People v. Lewis,* 75 Ill. App. 560, 393 N.E.2d 1380, 1384 (1979).

The Iowa Supreme Court followed the majority rule. The state high court noted that under Iowa Code of Professional Responsibility, a lawyer may reveal "the intention of his client to commit a crime and the information necessary to prevent the crime," and should represent a client zealously "within the bounds of the law." Iowa Code of Professional Responsibility, Canons 4, 7. The Court further observed that a lawyer who knowingly uses perjured testimony or aids a client to commit a criminal act could also be subject to prosecution for suborning perjury. Under the circumstances, the court praised the attorneys "for the high ethical manner" in which the matter was handled. *State v. Whiteside,* 272 N.W.2d 468, 471 (Iowa 1978). *See also State v. Henderson,* 205 Kan. 231, 468 P.2d 136, 140-1 (1970).

Given the majority position, it is surprising that the Court of Appeals reached such a dramatically different conclusion. According to the Court of Appeals, "counsel's actions, in particular the threat to testify against appel-

lant, indicate that a conflict of interest had developed between counsel and appellant, even though this conflict was admittedly precipitated by appellant's intention to testify falsely." "At this point," wrote the Court, "counsel had become a potential adversary and ceased to serve as a zealous advocate of appellant's interests." *Whiteside v. Scurr*, 744 F.2d at 1329. (A11)

The Court of Appeals attempts to contain the damage to the integrity of the courts and lawyers by attempting to limit its ineffective assistance of counsel holding to situations where an attorney admonishes his client with a "threat to testify" against him. *See Whiteside v. Scurr*, 744 F.2d at 1331.[2] The panel opinion, however, contains language that is much broader than its disclaimer suggests. For instance, the panel opinion states that "counsel's ac-

---

[2]The "threat," as remembered by lawyer Robinson, was a statement that he "probably would be allowed to impeach that particular testimony" if Whiteside took the stand and lied. (A85) This statement is most reasonably construed not as a threat by the lawyer to actually take the stand as a rebuttal witness, but simply to correct misimpressions through cross-examination of the lawyer's own witness. *See United States v. Petras*, 592 F.2d 525 (9th Cir. 1979), *cert. denied*, 422 U.S. 910 (1979). From the narrow perspective of client self interest, impeachment through questioning by his own lawyer, with opportunities for self correction, is far preferrable than exposure to cross-examination by the prosecutor. *See e.g. U.S. v. Bad Cob*, 560 F.2d 877, 883 (8th Cir. 1977) (Introduction by a witness himself of his prior conviction is a common trial tactic recommended by text writers on trial practice.).

In addition, Whiteside does not recall any "threat to testify." At the hearing on his motion for a new trial, he only recalled that his lawyer asked Whiteside if he wanted his attorney to withdraw. (A70) As a result, it is clear that Whiteside himself did not remember, and did not rely on, any "threat" by his attorney to testify as a rebuttal witness when he abandoned his perjury scheme. If it were true that the "threat to testify" was the linchpin of the opinion, this Court would have a clear basis for summary reversal.

tion in threatening to withdraw, advise the state court trial judge, and testify against appellant if the appellant testified falsely, impermissibly compromised appellant's right to effective assistance of counsel." *Whiteside v. Scurr*, 744 F.2d at 1329. (A12) This sweeping declaration provides no effective guidance for lower courts and attorneys who grapple with client perjury issues.[3]

In addition to the very doubtful handling of the effectiveness of counsel issue, the Court of Appeals' handling of the prejudice prong of *Strickland v. Washington*, is also highly suspect. According to the Court of Appeals, no prejudice need be shown because of the presence of an actual conflict of interest between the attorneys, who seek to prevent their client from committing perjury, and their client. *See Whiteside v. Scurr*, 744 F.2d at 1330. (A13) As a result, the Court of Appeals set aside Whiteside's conviction even though there was utterly no showing that he was prejudiced by the conduct of his attorneys.

It is true that this Court has, in limited circumstances involving multiple representation of clients by one lawyer or law firm, waived the conventional actual prejudice requirement in the effective assistance of counsel context. In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), for instance, this Court held that where a lawyer represents two or more defendants in the same criminal proceeding, there is no need to "indulge in nice calculations as to the amount

---

[3]See also the broad alternate holding of the Court of Appeals on the "right to testify" issue, where the Court declares that counsel's action "impermissibly compromised appellant's right to testify in his own defense by conditioning representation by counsel and confidentiality upon appellant's restricted testimony." 744 F.2d at 1329 (A12). This rule of law has implications far beyond factual settings involving so-called threats of attorneys to testify against their clients.

of prejudice attributable to the conflict" once it is shown that an actual conflict of interest adversely affects the lawyer's performance. 466 U.S. at 449.

But in this case, there is no "actual conflict of interest." A conflict of interest implies the collision of two legally recognized rights. Because Whiteside had no constitutionally or statutorily recognized right to commit perjury, *Harris v. New York,* 401 U.S. 222 (1971), there was by definition no conflict of interest. *See* Gibson, J., *Whiteside v. Scurr,* Slip Op. at 3 (A27), Fagg, J., *id.,* at 7 (A31)

In addition, the conversations between Whiteside and his lawyer involved, at most, a *potential* conflict of interest. Whiteside told his lawyer that he was prepared to lie on the stand, offering the opinion that "If I don't say I saw a gun, I'm dead." (A85) Had Whiteside persisted in his perjury proposal, the potential conflict might have ripened into an actual conflict of interest.[4] When Whiteside decided not to press the point, the possibility of an actual conflict with his lawyer was averted. *See* Fagg, J., *Whiteside v. Scurr,* Slip. Op. at 7. (A31)

Finally, in order to prevail under the rule of *Cuyler v. Sullivan,* the defendant must identify "an actual lapse in representation." 446 U.S. at 249. But the only "lapse" at trial was the defeat of Whiteside's perjury plan.

It is hard to see how the successful efforts of Whiteside's attorneys to convince their client not to commit per-

---

[4]Whiteside himself refused to characterize the discussion between himself and his attorneys as a conflict, (A70), and lawyer Robinson recalls that "he [Whiteside] just dropped it entirely" after their brief conversation. (A89)

jury was a "lapse" of advocacy. Indeed, the effectiveness of counsel would have been more suspect had Whiteside's lawyers allowed him to take the stand and testify falsely that he saw a gun in light of the fact that none of the three eyewitnesses saw a gun and the police search failed to discover a weapon. It is ironic that the Court of Appeals hoisted Whiteside's lawyer on the petard of "ineffective assistance" when his client, had he defied counsel and testified falsely, would have been left to the mercy of a judge and jury who would have likely concluded that Whiteside was not an innocent caught in the law's web, but a culprit who was prepared to lie on the stand in a desperate attempt to save his own skin. *See United States v. Grayson*, 438 U.S. 41 (1978) (sentencing judge may consider apparent perjury of defendant in determining length of incarceration).

In summary, the Court of Appeals seriously misapplied both prongs of *Strickland v. Washington*. The end result of this combination of errors is that any criminal defendant who makes properly phrased claims that his attorney prevented him from committing perjury will be entitled to an evidentiary proceeding attacking his or her conviction on ineffective assistance of counsel grounds without an allegation of prejudice. Specifically, under the holding of the Court of Appeals, a federal court will be required to grant relief to a petitioner who declares, "Judge, I had a really good lie cooked up, but because my lawyer talked me out of it by threatening to expose me if I committed perjury on the stand, I am now entitled to a new trial so that I can try out my story." It is respectfully submitted that this Court should review the judgment and opinion of the Court of Appeals to prevent this untoward result.

II. THE UNPRECEDENTED ALTERNATE HOLDING OF THE COURT OF APPEALS THAT A CONSTITUTIONAL "RIGHT TO TESTIFY" IS VIOLATED WHEN AN ATTORNEY INFORMS A CLIENT THAT THE ATTORNEY WILL WITHDRAW OR ADVISE THE COURT IF THE CLIENT PERSISTS IN HIS PERJURY SCHEME SERIOUSLY UNDERMINES ESTABLISHED PRINCIPLES OF PROFESSIONAL ETHICS.

The Court of Appeals also held that "counsel's action impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony." 744 F.2d at 1329. (A12) This holding reasonably may be construed to mean that whenever a lawyer threatens to withdraw in order to prevent a client from committing perjury, or indeed for any reason relating to the client's wishes with respect to his own testimony, a constitutional violation occurs.

The Court of Appeals' "right to testify" holding is doubtful on the merits. To begin with, there is a substantial question whether there is a constitutionally based "right to testify" at all. It is not expressly contained in the Fifth or Sixth Amendments, and the Court of Appeals is silent about its constitutional source. *See Wright v. Estelle,* 572 F.2d 1071, 1073 (5th Cir. 1978) (Thornberry, J., et al., concurring) (decision whether to testify is properly allocated to defendant's attorney, not to defendant). *But see id.,* at 1074-80 (Godbold, J., dissenting) (right to testify is personal to defendant and of constitutional dimension). The "right to testify" may lurk in the shadows of *Faretta v. California,* 422 U.S. 806 (1975), but it has yet to make a clear appearance in the cases of this Court.

Even assuming there is a "right to testify" of constitutional dimension, it is hard to see how it was violated under the facts and circumstances of this case. A witness in a criminal murder trial, even the defendant, does not have a constitutional right to testify about anything he or she wishes. The testimony of the defendant is subject to numerous restraints such as relevance, the hearsay rule, and other concepts of admissibility. Similarly, a criminal defendant's privilege to testify does not include the right to commit perjury. *Harris v. New York,* 401 U.S. 222, 225 (1971). As a result, the Court of Appeals for the Seventh Circuit has held that an attorney may refuse to put a perjury-determined defendant on the witness stand without impinging on his constitutional right to testify truthfully. *United States v. Curtis,* 742 F.2d 1070 (1984).

The clear conflict between the Seventh Circuit in *Curtis* and the Eighth Circuit in this case on the "right to testify" issue presents a strong reason for this court to grant review. In addition, by holding that counsel committed constitutional error by convincing his client not to take the stand and testify falsely, the Court of Appeals has introduced a novel constitutional concept that will undermine the ability of defense counsel to perform their roles as officers of the court as generally required by the various Codes of Professional Ethics. It will make effective representation more difficult for defense counsel by depriving them of the tools necessary to protect clients from the often patently foolish decision to commit the kind of perjury on the stand that is likely to be detected both by the guilt-finding judge or jury and the sentencing judge. *See Wright v. Estelle,* 572 F.2d at 1073 (Thornberry, J., et al., specially concurring) (the defendant may have a fool

for a client, but not a fool for an attorney). As with the ineffective assistance of counsel holding, the Court's "right to testify" rule will undermine the stability of criminal convictions in cases where defense attorneys prevented their clients from committing perjury by advising them of the actions they would take under the Rules of Professional Responsibility, even though there is absolutely no reason to question the reliability of the original fact-finding process that led to the conviction.

III. THE PANEL'S VAGUE HOLDING THAT WHITESIDE'S ATTORNEYS VIOLATED DUE PROCESS OF LAW PROVIDES NO GUIDANCE FOR LOWER COURTS OR LAWYERS.

As a third ground for reversal, the panel opinion states that "we hold that counsel's action deprived appellant of due process" as well as effective assistance of counsel. *Whiteside v. Scurr,* 744 F.2d at 1328. (A9) The contours of the Court's due process theory are not explored anywhere in the opinion, however, and we are left to speculate exactly what the holding actually means. Apparently, the Court of Appeals believes a defendant may attack his state court conviction in federal court on due process grounds even if it can be demonstrated only that the defendant's lawyer *confidentially* advised the defendant that if he or she insisted on committing perjury on the stand, the lawyer would be required to either withdraw or advise the court of the situation. The Court of Appeals thus seems to extend the previous due process frontier established by the Ninth Circuit in *Lowery v. Cardwell,* 575 F.2d 727 (9th Cir. 1978), where the Court of Appeals dubiously reversed a conviction on due process grounds where the fact finder *actually* knew that the defendant was

committing perjury on the stand. As with the other holdings of the Court of Appeals in this case, this ill-defined rule of law will seriously undermine the integrity of the courts and the lawyers who represent criminal defendants.

IV. THE INEFFECTIVE ASSISTANCE OF COUNSEL/RIGHT TO TESTIFY/DUE PROCESS HOLDINGS OF THE COURT OF APPEALS ESTABLISHES AN UNWORKABLE FRAMEWORK THAT LEAVES DEFENSE COUNSEL WITH NO ACCEPTABLE OPTIONS WHEN CONFRONTED WITH A PERJURY-DETERMINED CLIENT ON THE EVE OF TRIAL.

When the opinion of the Court of Appeals is fully considered, it is clear that it dramatically restricts the options available to an attorney who is confronted with a perjury-determined client on the eve of trial. Apparently concerned about such limitations, the court attempts to appear flexible at places, claiming, for instance, that it expresses "no view on the Sixth Amendment implications of a lawyer's simply moving to withdraw, with or without informing the trial court of the reason." *See Whiteside v. Scurr*, 744 F.2d at 1331. (A14)

The purported option of simple withdrawal, however, is entirely illusory. Most trial judges will not allow an appointed attorney to withdraw on the eve of trial without a compelling reason. When asked for a reason for withdrawal, it will not be sufficient to simply state that the lawyer and client are at odds over defense strategy. *See Morris v. Slappy*, — U.S. —, —, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). And, an attorney who refuses to reveal the reason for nondisclosure will telegraph the character of the problem to an experienced judge, a result disapproved in *Lowery v. Cardwell*, 575 F.2d 727, 730-31 (9th

Cir. 1978). In addition, if a defendant could force an attorney to withdraw simply by declaring his determination to commit perjury shortly before trial, the client could attempt to escape prosecution by repetitively announcing perjury plans to attorneys on the day of trial.

The comment to ABA Model Rule of Professional Responsibility 3.3 (1983) recognizes the possibility that an unscrupulous client might seek to produce a series of mistrials by repetitively insisting on committing perjury. The comment suggests that the solution is to withdraw the right to counsel upon the second offense. *Whiteside v. Scurr,* 744 F.2d at 1333. (A19) This penalty, however, is far more draconian than the so-called "threats" that were made by the defense lawyers in the present case. Lawyers in criminal cases are necessities, not luxuries. *United States v. Cronic,* — U.S. —, 104 S.Ct. 2039, 2043, 80 L.Ed.2d 657, 664 (1984).

The Court of Appeals' apparent remedial flexibility in the effective assistance of counsel area is also substantially limited by its "right to testify" holding. According to the Court, it is "impermissible to condition continued representation and confidentiality upon appellant's restricted testimony." *Whiteside v. Scurr,* 744 F.2d at 1329 (A11) When this holding is read in tandem with the Court's ineffective assistance of counsel holding, the only constitutionally permissible option for an attorney confronted with a perjury-determined client is to continue representation and allow the client to testify as he or she desires.

The constitutional requirement that a defense attorney grudgingly must acquiesce to client perjury is an un-

workable solution to the problem. In order to avoid actively assisting the client in perpetrating the crime of perjury, and indeed expose himself or herself to criminal liability for suborning perjury under state law, the lawyer could not directly question his client about the subject area of the proposed perjury if he took the stand. *In re Branch,* 70 Cal. 2d 200, 74 Cal. Rptr. 238, 449 P.2d 174, 181 (1969). In addition, the lawyer could not make reference to the perjured testimony in closing arguments. The only option, then, is free style narrative without the assistance of questioning from counsel.

Such an awkward evidentiary presentation is not likely to be to the advantage of the lawyer's client at trial. If the trial is before a judge, it will be obvious to the fact-finder that the client is committing perjury. *See* ABA Model Rule of Professional Conduct 3.3, Comment (A18) In this setting, the client plainly would be better served if an attorney is able to persuade his client not to commit perjury in the privacy of pretrial consultations than if the client is simply left to his or her own devices in the court room.

If the case is being tried before a jury, the free style narrative poses a different set of problems. The prosecutor may object to the manner in which the testimony is being presented. The general rule is that the decision whether to permit such a narrative rests with the sound discretion with the judge. *See* Fed. R. of Evid. 611; Iowa R. of Evid. 611(a); *McCormick on Evidence,* 2d Ed., § 5, at 7 (1972). At this point, two troublesome events could occur. First, the trial judge might well simply refuse to allow the witness to testify in a narrative fashion. *Hutter Northern Trust v. Door County Chamber of Commerce,*

467 F.2d 1075, 1078 (7th Cir. 1972). Or, the judge might well ask defense counsel to explain why the unusual procedure is necessary. In either circumstance, the effort to protect the newly discovered "right to testify" from system-imposed influences will be defeated.

In addition, the quality of advocacy offered by the defense counsel will suffer under the free narrative solution. First, without the specific interrogation and guidance of an attorney's questions, the untrained defendant may unwittingly expose himself to devastating cross-examination by unnecessarily opening damaging areas of testimony. Second, the ability of the lawyer to convincingly marshal the evidence in his closing argument, an extremely important stage at a jury trial, will be compromised by his client's dogged exercise of his right to testify falsely. *See Herring v. New York,* 422 U.S. 853, 862 (1975).

In sum, the opinion of the Court of Appeals eliminates the ability of the criminal justice system to work out problems raised by perjury-determined clients on an individual basis with minimum adverse consequences to the lawyers, the courts, and the clients themselves. This Court should review the case to prevent undue disruption to the system which, prior to the disturbing habeas corpus holding of the Court of Appeals, operated satisfactory within the constraints composed by prevailing notions of professional ethics.

———o———

CONCLUSION

For all the above reasons, it is respectfully submitted that the petition for a writ of certiorari in the above-captioned matter should be granted.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5166

THOMAS D. MCGRANE
Assistant Attorney General

**Counsel of record*

INDEX

Page

Appendix A—Opinion of the United States Court of Appeals for the Eighth Circuit, filed September 19, 1984. ..... A1

Appendix B—Order of the United States Court of Appeals for the Eighth Circuit denying rehearing en banc, filed December 24, 1984. ..... A22

Appendix C—Opinion of the Supreme Court of the State of Iowa, filed December 20, 1978. ..... A34

Appendix D—Opinion of the United States District Court for the Southern District of Iowa, filed December 7, 1982. ..... A41

Appendix E—Orders of Associate Justice Harry A. Blackmun of the Supreme Court of the United States, extending the time to file a petition for writ of certiorari and staying the mandate of the court of appeals, filed November 13, 1984 and January 17, 1985. ..... A43

Appendix F—Excerpts from the Appendix of *Whiteside v. Scurr*, 272 N.W.2d 468 (Iowa 1978). A46

APPENDIX A

Emmanuel Charles WHITESIDE,
Appellant,

v.

David SCURR, Warden, Appellee.

No. 83-1015.

United States Court of Appeals,
Eighth Circuit.
Submitted May 14, 1984.
Decided Sept. 19, 1984.

Before McMILLIAN, Circuit Judge, BENNETT,* Circuit Judge, and ARNOLD, Circuit Judge.

McMILLIAN, Circuit Judge.

Emmanuel Charles Whiteside appeals from a final judgment entered in the District Court for the Southern District of Iowa denying his petition for writ of habeas corpus. For reversal appellant argues the district court erred in holding that counsel's threats to seek to withdraw, disclose confidential discussions and testify against him did not deny him due process and effective assistance of counsel. For the reasons discussed below, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

A state court jury convicted appellant of second degree murder for the stabbing death of Calvin Love in 1977.

---

*The Honorable Marion T. Bennett, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

Appellant was sentenced to forty years imprisonment. Appellant and two companions had gone to Love's apartment to get some marijuana. During an argument about the marijuana, appellant stabbed Love as Love was moving toward him. Appellant's theory of defense was self-defense. According to appellant, Love had been reaching for a gun beneath a pillow when appellant stabbed him. When questioned by defense counsel in preparation for trial, appellant stated that he had not actually seen the gun, but that he thought that he had seen a gun and was convinced that Love had one because Love had a reputation for carrying a gun. Counsel questioned appellant's two companions and Love's girlfriend about the gun. They denied actually seeing a gun, although appellant's companions believed that Love probably did have a gun. Counsel also learned that the police had found no gun during a quick search of the room where the stabbing occurred. Nor had the apartment manager found a gun. Counsel personally searched the room for the gun without success. During the course of his investigation, however, counsel discovered that several hours after the stabbing, Love's girlfriend and his family had forced the police padlock on the apartment and had removed everything from the apartment.

Appellant was anxious about the success of his theory of self-defense if the gun was not found. Counsel had earlier advised appellant that the gun itself was not essential to his theory of self-defense and that the defense would be successful if the jury was convinced that appellant reasonably believed that Love had had a gun. Shortly before trial, appellant told counsel that he had seen something "metallic" in Love's hand just before the stabbing. This

discrepancy precipitated the disagreement between appellant and counsel that underlies this appeal. Counsel told appellant that if he insisted upon testifying that he saw a gun, then he (counsel) would move to withdraw, advise the state trial judge that the testimony was perjurious and testify against him.

At trial appellant testified only that he thought Love had a gun and that he had acted to protect himself from an assault by Love with the gun. Appellant was found guilty of second degree murder. On appeal to the state supreme court appellant argued that counsel's threats to withdraw, advise the state trial judge about his testimony and testify against him prevented him from presenting his defense and thus denied him a fair trial. The state supreme court rejected this argument, finding that "counsel was convinced with good cause to believe [appellant's] proposed testimony would [have been] deliberately untruthful" and that, consistent with the Iowa Code of Professional Responsibility for Lawyers, "[c]ounsel properly refused to be a partner in such a dishonest and deceitful scheme." *State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978). The state supreme court commended counsel for the "high ethical manner" in which the matter was handled. *Id.*

In 1981 appellant filed a petition for writ of habeas corpus alleging that counsel's threats to withdraw, advise the state trial judge and testify against him denied him the right to effective assistance of counsel, the right to present a defense and due process in violation of the fifth, sixth and fourteenth amendments. The district court found that the state courts' finding that appellant would have committed perjury was fairly supported by the record

and that appellant had failed to establish by convincing evidence that this finding was erroneous. *Whiteside v. Scurr,* No. Civil-81-246-C, slip op. at 2 (S.D.Iowa Dec. 7, 1982). The district court noted the constitutional right to testify did not include perjury and concluded that appellant was not denied due process or effective assistance of counsel because counsel prevented him from testifying falsely. *Id.* The district court denied the petition and this appeal followed.

As a preliminary matter, we note that during oral argument the state questioned whether appellant had exhausted available state remedies. The district court concluded that appellant had exhausted his due process and right to present a defense claims but may not have fairly presented the substance of the ineffective assistance of counsel claim to the state supreme court. The district court concluded, however, that because the state supreme court had already determined that the state code of professional responsibility vindicated counsel's actions and had in fact commended counsel for the "high ethical manner" in which the matter had been handled, further state court proceedings would be futile and that appellant was not required to exhaust the ineffective assistance of counsel claim. *Whiteside v. Scurr,* No. Civil-81-246-C, slip op. at 3-4 (S.D.Iowa Feb. 24, 1982) (order).

[1] We agree with the district court that further state court proceedings on the ineffective assistance of counsel claim would be futile. In addition, the ineffective assistance of counsel claim is so closely tied to the due process and right to present a defense claims, which have clearly been exhausted, that these claims should be considered together in this petition. *See Batten v. Scurr,* 649

F.2d 564, 569 (8th Cir. 1981). In the present case appellant's due process, right to present a defense and ineffective assistance of counsel claims represent different legal arguments offered in support of essentially one ground for relief: that his defense counsel's actions prevented him from presenting his defense and denied him a fair trial. *See Sanders v. United States,* 373 U.S. 1, 16, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963). This ground for relief, the underlying facts, and the due process and right to present a defense claims were expressly raised in appellant's state court briefs. Appellant in his state court brief also expressly raised the ineffective assistance of counsel claim in the essentially identical context of conflict of interest between counsel and the defendant and submitted an appendix which included portions of the hearing on the motion for new trial about counsel's threat to seek to withdraw, advise the state trial judge and testify against him. In these circumstances, the substance of appellant's federal habeas corpus ground for relief was fairly presented to the state courts. *See Anderson v. Harless,* 459 U.S. 4, 6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982) (per curiam), *citing Picard v. Connor,* 404 U.S. 270, 275, 277-78, 92 S.Ct. 509, 513-514, 30 L.Ed.2d 438 (1971).

The problem presented on the merits in this case is what kind of action defense counsel, representing a defendant in a criminal case, may constitutionally pursue when counsel believes that the client intends to testify falsely. This issue implicates both due process and effective assistance of counsel considerations and has been extensively debated, but by no means resolved, by several courts and many commentators. *See United States v. Campbell,* 616 F.2d 1151, 1152 (9th Cir.) (no breach of

duty by defense attorney who substantially complied with ABA Proposed Defense Function Standard 4-7.7), *cert. denied,* 447 U.S. 910, 100 S.Ct. 2998, 65 L.Ed.2d 861 (1980); *Lowery v. Cardwell,* 575 F.2d 727, 730-31 (9th Cir.1978) (bench trial; due process analysis); *id.* at 732 (Hufstedler, J., specially concurring) (effective assistance of counsel analysis); *United States ex rel. Wilcox v. Johnson,* 555 F.2d 115, 120-22 (3d Cir.1977) (due process analysis and informative discussion of effective assistance of counsel); *Butler v. United States,* 414 A.2d 844, 849-50 (D.C.1980) (banc) (due process analysis); *Johnson v. United States,* 404 A.2d 162, 163-64 (D.C.1979) (veracity or falsity of defendant's testimony must not be conjectural); *Thornton v. United States,* 357 A.2d 429, 433-36 (D.C.) (following ABA Proposed Defense Function Standards), *cert. denied,* 429 U.S. 1024, 97 S.Ct. 644, 50 L.Ed.2d 626 (1976); *Commonwealth v. Wolfe,* 301 Pa.Super. 187, 447 A.2d 305, 309-10 & n. 7 (1982); *In re Goodwin,* 279 S.C. 274, 305 S.E.2d 578, 579-80 (1983) (following ABA Proposed Defense Function Standards). *Compare* ABA Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function, Proposed Defense Function Standard 4-7.7 (2d ed. 1980) (ABA Proposed Defense Function Standard) (Appendix A), *with* ABA Model Rules of Professional Conduct 3.3 & comment (1983) (ABA Model Rules) (Appendix B). *See generally* M. Freedman, Lawyers' Ethics in an Adversary System (1975); Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law,* 44 Mo.L.Rev. 601 (1979); Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System,* 29 Rutgers L.Rev. 332 (1976); Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's*

Conflicting Ethical Obligations to the Court and to His Client, 59 Den.L.J. 75 (1981); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 Mich.L.Rev. 1469 (1966); Wolfram, *Client Perjury,* 50 S.Cal.L.Rev. 809 (1977).

[2] Our discussion begins with the following observation: our analysis does not deal with the ethical problem inherent in appellant's claim. We are concerned only with the constitutional requirements of due process and effective assistance of counsel. As the ABA Model Rules 3.3 comment, appendix B, states, the Constitution prevails over rules of professional ethics, and a lawyer who does what the sixth and fourteenth amendments command cannot be charged with violating any precepts of professional ethics. This is a very controversial matter and we commend counsel for conscientiously attempting to address the problem of client perjury in a manner consistent with professional responsibility.

[3, 4] Appellant first argues that counsel improperly acted on the basis of mere suspicion that appellant would testify falsely. The reason why counsel believes that the defendant intends to testify falsely is an important threshold question because " '[w]here . . . the veracity or falsity of the defendant's testimony is conjectural, the ethical dilemma does not arise.' " *Butler v. United States,* 414 A.2d at 850, *citing Johnson v. United States,* 404 A.2d at 164. Both ABA Model Rule 3.3 and ABA Proposed Defense Function Standard 4-7.7 presuppose that defense counsel *knows* that the defendant's testimony will be false on the basis of either independent investigation or prior discussions with the defendant or both. Mere suspicion or inconsistent statements by the defendant alone are insufficient

to establish that the defendant's testimony would have been false. *See Butler v. United States,* 414 A.2d at 850-51 (inconsistent statements); *Johnson v. United States,* 404 A.2d at 164 (inconsistency between two proffered defenses); *Commonwealth v. Wolfe,* 447 A.2d at 310 n.7 (suspicion). Counsel must act if, but only if, he or she has "a firm factual basis" for believing that the defendant intends to testify falsely or has testified falsely. *See United States ex rel. Wilcox v. Johnson,* 555 F.2d at 122. It will be a rare case in which this factual requirement is met. Counsel must remember that they are not triers of fact, but advocates. In most cases a client's credibility will be a question for the jury.

[5-7] In the present case the state supreme court found that "counsel was convinced with good cause to believe [appellant's] proposed testimony would be deliberately untruthful," and that counsel had based this belief upon an independent investigation and prior discussions with appellant. 272 N.W.2d at 471. This factual determination is fairly supported by the record and is therefore presumptively correct. *See Sumner v. Mata,* 449 U.S. 539, 544, 101 S.Ct. 764, 767, 66 L.Ed.2d 722 (1980). For the purposes of our analysis, we presume that appellant would have testified falsely. We recognize, of course, that the criminal defendants' privilege to testify in their own defense does not include the right to commit perjury. *See Harris v. New York,* 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1 (1971). However, the fact that appellant would have committed perjury does not mean that appellant has waived his right to a fair trial, due process or effective assistance of counsel. *Cf. Lowery v. Cardwell,* 575 F.2d at 730 (examination of defendant ceased abrupt-

ly and was followed by counsel's in camera motion to withdraw and refusal to state the reason for the motion; only rational conclusion to be drawn by judge as fact-finder was that defendant had testified falsely; held denial of due process). The "remedy" for appellant's perjury is prosecution for perjury.

[8] Thus, in the present case defense counsel was confronted shortly before trial with appellant's intention to testify in his own defense in a manner that defense counsel had a firm factual basis for believing would be false. Counsel threatened appellant that he would withdraw from the case, advise the state court trial judge of appellant's intention, and testify against him as a rebuttal witness for the prosecution. Counsel's actions prevented appellant from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel. As noted by the court in *Lowery v. Cardwell*, 575 F.2d at 731, "[w]e are acutely aware of the anomaly presented when mistrial must result from counsel's bona fide efforts to avoid professional irresponsibility. We find no escape, however, from the conclusion that fundamental requisites of fair trial have been irretrievably lost."

As recently noted by the Supreme Court in *Strickland v. Washington*, — U.S. —, 104 S.Ct. 2052, 2063, 2065, 80 L.Ed.2d 674 (1984) (citations omitted; emphasis added),

> The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause. . . . Thus, a fair trial is one in which evidence subject

> to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled.
>
> . . . The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.
>
> . . . .
>
> Representation of a criminal defendant entails certain basic duties. *Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest.* From counsel's function as assistant to the defendant derive the overreaching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Thus, the fair and effective operation of the adversary system depends upon the attorney who must zealously ad-

vocate the defendant's cause to judge and jury for determination. Counsel's ability to serve as an effective advocate, in turn, depends upon the defendant's ability to disclose information fully and in confidence to counsel. "When an attorney unnecessarily discloses the confidences of [the] client, [the attorney] creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation." *United States ex rel. Wilcox v. Johnson,* 555 F.2d at 122.

[9] In the present case counsel's actions in threatening to withdraw, advise the state trial judge and testify against appellant if appellant testified falsely, impermissibly compromised appellant's right to effestive assistance of counsel. Despite counsel's legitimate ethical concerns, counsel's actions were inconsistent with the obligations of confidentiality and zealous advocacy. *See Lowery v. Cardwell,* 575 F.2d at 732 (Hufstedler, J., specially concurring). *See generally* Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 Mich.L.Rev. at 1475-78. Counsel's actions, in particular the threat to testify against appellant, indicate that a conflict of interest had developed between counsel and appellant, even though this conflict was admittedly precipitated by appellant's intention to testify falsely. At this point counsel had become a potential adversary and ceased to serve as a zealous advocate of appellant's interests. "No matter how commendable may have been counsel's motives, [counsel's] interest in saving himself [or herself] from potential violation of the canons [or the ABA Model Rules of Professional Conduct] was adverse to [the] client, and the end product was [counsel's] abandonment of a diligent defense." *Lowery v.*

Cardwell, 575 F.2d at 732 (Hufstedler, J., specially concurring).

[10-12] Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony. We hold that criminal defendants have the constitutional right to testify which, although not specifically expressed in the Constitution or the Bill of Rights, is implicit in the fifth and fourteenth amendments' due process guarantee of a fair adversarial process and in the sixth amendment's guarantee of the right to meet and confront accusations, to be present and to present evidence and witnesses on one's behalf, including the right to present oneself as a witness. *See United States v. Bifield,* 702 F.2d 342, 349 (2d Cir.), *cert. denied,* — U.S. —, 103 S.Ct. 2095, 77 L.Ed. 2d 304 (1983); *Alicea v. Gagnon,* 675 F.2d 913, 923 (7th Cir.1982); *United States ex rel. Wilcox v. Johnson,* 555 F.2d at 118-19; *see also Wright v. Estelle,* 572 F.2d 1071, 1075-76 (5th Cir.) (Godbold, J., dissenting), *cert. denied,* 439 U.S. 1004, 99 S.Ct. 617, 58 L.Ed.2d 680 (1978). Counsel's actions improperly forced appellant in effect to choose between two constitutional rights, the right to testify in one's own defense and the right to effective assistance of counsel, and infringed both. *See United States ex rel. Wilcox v. Johnson,* 555 F.2d at 120-21.

The appropriate test for prejudice in ineffective assistance claims was clarified in *Strickland v. Washington,* 104 S.Ct. at 2068: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability

sufficient to undermine confidence in the outcome." However, the Court noted that "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance." *Id.* at 2067, *citing United States v. Cronic,* — U.S. —, 104 S.Ct. 2039, 2046-47 n. 25, 80 L.Ed.2d 657. The Court further noted that ineffective assistance of counsel claims that involved conflict of interest warranted "a similar, though more limited, presumption of prejudice. . . . Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.'" 104 S.Ct. at 2067, *citing Cuyler v. Sullivan,* 446 U.S. 335, 348, 350, 100 S.Ct. 1708, 1718, 1719, 64 L.Ed.2d 333 (1980) (footnote omitted).

[13] Although *Cuyler v. Sullivan* involved an allegation of conflict of interest on the basis of multiple representation, we think that the same limited presumption of prejudice should apply to the conflict of interest between counsel and client involved in this case. Conflicts of interest necessarily implicate breach of counsel's duty of loyalty, which is "perhaps the most basic of counsel's duties." *Strickland v. Washington,* 104 S.Ct. at 2067. Here the breach of loyalty arose from counsel's threat to testify against appellant. Such threats undermine the fundamental trust between lawyer and client that can exist only if the lawyer "can convince the client that full and confidential disclosure . . . will never result in prejudice to the client by any word or action of the lawyer." Freedman, *Professional Responsibility of the Criminal Defense Law-*

yer: The Three Hardest Questions, 64 Mich.L.Rev. at 1473. Thus, threats like the one here are presumptively prejudicial to the defense.

We recognize the difficulties created when the duty to render effective assistance, imposed by the sixth and fourteenth amendments, is not completely congruent with the relevant code of professional ethics. We wish to stress that our task is not at all to determine whether counsel behaved in an ethical fashion. That question is governed solely by the Iowa Code of Professional Responsibility, as it was in effect at the time of the trial in this case, and as it has been authoritatively interpreted by the Supreme Court of Iowa. The Supreme Court of Iowa is the last word on all questions of state law, and the Code of Professional Responsibility is a species of state law. It nevertheless remains our duty to determine what the sixth amendment requires. In doing so, we are at liberty to consider, purely as guidelines and not as governing rules, the views of authorities on legal ethics, including views set forth in various proposed standards and codes of professional conduct. In this connection, we note that counsel here fell short not only under the strict Freedman approach, but also under the ABA Proposed Defense Function Standards. Even the ABA Model Rules of Professional Conduct do not appear to sanction a threat by defense counsel actually to take the stand and to testify as a prosecution witness on rebuttal. Our holding is no broader than necessary to dispose of the perhaps unique fact situation presented here. In particular, we express no view on the sixth amendment implications of a lawyer's simply moving to withdraw, with or without informing the trial court of the reason. Surely a lawyer who actually

testified against his own client could not be said to be rendering effective assistance. The same is true, we think, of a lawyer who threatens to testify against his own client.

[14] Here, counsel went so far in his (at least initially) commendable zeal to avoid deceiving the court that he became an adversary to his own client. In this situation, we believe that appellant did not receive the effective assistance of counsel.

Accordingly, the judgment of the district court is rereversed and the case is remanded to the district court with directions to grant the petition for writ of habeas corpus if the state does not begin new trial proceedings within a period to be determined by the district court.

Appendix A

ABA Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function, Proposed Defense Function Standard 4-7.7 (2d ed. 1980), provides:

> (a) If the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true but the defendant insists on the right to trial, counsel must strongly discourage the defendant against taking the witness stand to testify perjuriously.
>
> (b) If, in advance of trial, the defendant insists that he or she will take the stand to testify prejuriously, the lawyer may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so.

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner, instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier of or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

Appendix B

ABA Model Rules of Professional Conduct 3.3 & comment (1983) provides:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.
Comment:

. . . .

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to per-

suade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary

to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhops nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Model Rule 1.2(d), (e) provides:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

Model Rule 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> > (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1015

Appeal from the United States District Court for the Southern District of Iowa

Emmanuel Charles Whiteside,

Appellant,

v.

David Scurr, Warden,

Appellee.

Filed: December 24, 1984

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges.

ORDER

McMILLIAN, Circuit Judge.

The motion for rehearing en banc is denied. Contrary to the argument presented by the state in support of the motion for rehearing en banc, our opinion does not create a right to commit perjury. Our opinion expressly states that the criminal defendant's privilege to testify in his or her own defense does not include the right to commit perjury. Perjury is a most serious offense and anyone who commits perjury should be pun-

ished for it. Our holding is limited to the fact situation in the present case. We hold only that a lawyer who has a firm factual basis for believing that his or her client is about to commit perjury, because of confidential communications the client has made to the lawyer, may not disclose the content of those confidential communications to the trier of fact, in the present case the jury. The lawyer who discloses confidential communications or who threatens to do so has departed from the role of an advocate and has become an adversary to the interests of his or her client. Such a client has lost the effective assistance of counsel, a right to which even those defendants who may later be accused of perjury are entitled.

LAY, Chief Judge, concurring in the denial of a rehearing en banc.

I concur in the denial of a rehearing en banc, but write specially to address Judge Fagg's dissenting opinion. In characterizing the issue in this case as whether the insistence of defendant's counsel that the defendant testify truthfully denied the defendant effective assistance of counsel, Judge Fagg totally misreads the holding of *Whiteside v. Scurr,* No. 83-1015 (8th Cir. September 19, 1984). His dissent is certain to leave both lawyers

and laypersons confused as to the breadth of the decision in this case.[1]

The panel opinion in *Whiteside* does not hold that the defendant was denied his constitutional rights because counsel demanded he testify truthfully. A lawyer must always insist that his or her client testify with veracity. As the panel opinion recognizes, such insistence neither creates a conflict of interest nor renders counsel ineffective. To suggest otherwise, sets up a straw-man, easily knocked down.

Ethical standards allow a lawyer to seek withdrawal when a client insists on giving testimony the lawyer knows to be perjurious. *See* American Bar Association, *Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function,* Proposed Defense Function Standard 4-7.7 (2d ed. 1980). Counsel should not, however, advise the court of his or her reason for seeking withdrawal.[2] In this case, defendant's counsel

---

[1]The Des Moines Sunday Register published a distortional article titled "Iowa Lawyers criticize ruling, say it encourages perjury by defendants" and describing the panel opinion as holding "that an Iowa man convicted of murder must be retried or set free because his attorney wouldn't let him commit perjury." Des Moines Sunday Register, Oct. 14, 1984, at 3B. Similar misinterpretation is demonstrated by the former Iowa Attorney General's characterization of the panel opinion as "outrageous," and the admonition of a Drake University Law School professor to "pay attention to the Code of Professional Responsibility for Lawyers' [sic]—and not be a party to perjury * * *." *Id.*

[2]I recognize that nonverbal acts may, in some circumstances, inform the court that the client is intending to give false testimony. In *Lowery v. Cardwell,* 575 F.2d 727 (9th Cir.

(Continued on next page)

threatened to take the stand and impeach his client. Such a threat is not only unethical, it creates a conflict of interest between the lawyer and the defendant rendering counsel ineffective in violation of defendant's sixth amendment rights.

This court's holding that a counsel's threat to testify against his or her client in a criminal case violates the defendant's constitutional rights does not lessen counsel's duty to avoid subornation of perjury. As the Ninth Circuit observed in *Lowery:*

> The problem presented is that which arises when defense counsel * * * forms the belief that his client's defense is based on false testimony. We start with the basic proposition that if, under these circumstances, counsel informs the fact finder of his belief he has, by that action, disabled the fact finder from judging the merits of the defendant's defense. Further, he has by his action openly placed himself in opposition to his client upon her defense. The consequences of such action on the part of counsel, in our judgment, are such as to deprive the defendant of a fair trial.

(Continued from previous page)

1978), for example, counsel abruptly ceased questioning his client, the defendant, after she falsely denied shooting a deceased man. Counsel requested a recess, and made a motion in chambers to withdraw, but refused to state why he sought withdrawal. The motion was denied, and counsel continued his representation of the defendant. The attorney, however, did not argue that the defendant had not shot the victim, instead he contended that the state's case was subject to reasonable doubt. The Ninth Circuit held that the attorney's acts "amounted to such an unequivocal announcement to the fact finder as to deprive appellant of due process." *Id.* at 730. Withdrawal before trial, or when feasible, without advising the trial judge of the particulars of the situation, normally will not constitute an "unequivocal announcement" depriving a defendant of his or her constitutional rights.

Lowery, 575 F.2d at 730. Judge Fagg's dissenting opinion broadens the holding in *Whiteside* far beyond its limits. That it is both unethical and a denial of effective assistance of counsel for an attorney to threaten to testify against the defendant client as to information given in confidence by the client is uncontestable. That a lawyer must serve as a guardian of truth in the judicial process is also without doubt. The panel opinion in *Whiteside* does no more than tie these two certainties together.

JOHN R. GIBSON, Circuit Judge, with whom ROSS, FAGG and BOWMAN, Circuit Judges, join, dissenting from denial of rehearing en banc.

The Court has granted habeas relief to a petitioner whose only claim of prejudice is that his counsel required him to testify truthfully. The starkness and incongruence of the court's position are demonstrated by the following excerpts, which outline its holding:

> [W]e presume that appellant would have testified falsely.
>
> • • • •
>
> • • • Counsel threatened appellant that he would withdraw from the case, advise the state court trial judge of appellant's intention, and testify against him as a rebuttal witness for the prosecution. Counsel's actions prevented appellant from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel.
>
> • • • •
>
> Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by con-

ditioning continued representation by counsel and confidentiality upon appellant's restricted testimony.

Whiteside v. Scurr, 744 F.2d 1323, 1328, 1329 (8th Cir. 1984).

The court then proceeds to presume prejudice and in my view this is its most critical error. In *Strickland v. Washington,* 104 S. Ct. 2052 (1984), the Supreme Court made clear that ineffective assistance claims must raise two components, deficient performance and prejudice. Failure to prove either element requires denial of relief. *Id.* at 2069-70. I join Judge Fagg in his views on the performance component but I write separately to underscore my concerns with the absence of prejudice, which is a sufficient ground to deny the writ.

It is true that *Strickland* describes a limited presumption where there is a conflict of interest. The court in its opinion recognizes the language of the *Strickland* test of prejudice but fails to apply it to the facts in this case. The court, quoting *Strickland,* states that prejudice must be presumed only if counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." 744 F.2d at 1330. A strong argument can be made that there is no actual conflict of interest. To say that there is a conflict requires that we recognize the right of Whiteside to testify falsely, while the Supreme Court has made plain that a criminal defendant has no right to commit perjury.

Assuming that there was a conflict, however, the record simply does not show that it adversely affected counsel's performance. The attorney's threat produced a single effect: it persuaded Whiteside to tell the truth

as a witness. The case was tried and Whiteside testified, although, as the court observes on numerous occasions, his testimony was restricted in the sense that he was prevented from testifying falsely. The record reveals that Whiteside testified that he thought Love had a gun, which was precisely what he told his lawyer he would testify to, before he told his lawyer that he intended to testify that he saw something metallic in Love's hand just before the stabbing. I cannot justify the court's presuming that Whiteside was prejudiced when he testified fully in his defense and was restricted only in the sense that he did not testify falsely. Whiteside has not suggested that any other prejudice resulted from the threats of his counsel. The record reveals no other action during or before the trial that in any way demonstrates that counsel's performance was adversely affected by an actual conflict of interest. *Strickland* makes clear that it does not announce a per se presumption of prejudice in conflict of interest situations. In actuality, the court does apply such a per se rule to presume prejudice in this case.

Although it may not be applicable, *Strickland* lays down another test if there is no conflict: prejudice arises only if "but for counsel's errors, the result of the proceeding would have been different." 104 S. Ct. at 2068. The facts in this case make it unlikely that lying on the stand would have changed the outcome in Whiteside's trial. As the Iowa Supreme Court observed:

> There were three other persons in the room. No one testified to having seen a gun. A search of the apartment shortly after Love's death did not disclose one. * * * [D]uring the argument Love told his girl friend to get his "piece"—meaning his gun. This refutes defendant's claim Love already had one.

State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978). This evidence both demonstrates the strength of the case against Whiteside and impeaches his proposed false testimony. Thus, we cannot conclude that the result of the trial would have been different. Whiteside has failed to demonstrate actual prejudice under the nonconflict standard.

The court makes much of the constraints on communication between lawyer and client because of counsel's threat. This concern is more theoretical than real, given that the threat occurred immediately before trial. Prior to this, there had been numerous conferences between lawyer and client, with the lawyer having full appreciation of the likely testimony from Whiteside. The fundamental trust between the lawyer and client was threatened more by Whiteside's decision to give perjured testimony, *after* a full and confidential disclosure of facts surrounding the case.

Strickland makes clear that the ultimate focus "must be on the fundamental fairness of the proceeding." 104 S. Ct. at 2069. Fundamental fairness cannot be stretched to encompass prejudice resulting from the absence of perjured testimony. *Strickland* also observes that a defendant is not entitled to the "luck of the lawless decisionmaker," *id.* at 2068, and its definition of prejudice cannot include an entitlement to receive the benefit of lawless or perjured testimony.

The court examines counsel's position primarily in terms of legal ethics. The Supreme Court of Iowa was more realistic in discussing not only the ethical considerations, but that a lawyer who knowingly uses perjured testi-

mony or who aids a client's criminal act may be subject to prosecution for suborning perjury. *Whiteside,* 272 N.W.2d at 471. The majority does not discuss the proper course for the lawyer in the position faced by Whiteside's counsel, which presents an extremely complex question. We should not attempt to resolve this issue in separate opinions. Consideration of counsel's dilemma is further reason for rehearing en banc, particularly in view of the conflicting academic discussions of this question. *See Whiteside,* 744 F.2d at 1327. It is sufficient here, however, simply to conclude that Whiteside has not been prejudiced by being required to testify truthfully. The court should rehear this case en banc and on full reconsideration should deny the writ.

FAGG, Circuit Judge, dissenting from denial of rehearing en banc, joined by ROSS, John R. GIBSON, and BOWMAN, Circuit Judges.

The panel opinion addresses an issue of significant constitutional dimension and of paramount concern to lawyers representing criminal defendants:

> Was Emmanuel Charles Whiteside denied effective assistance of counsel because his lawyer insisted that he testify truthfully in his own behalf?

I find it difficult to believe that a panel of this court would hold that a lawyer who makes use of a private dialogue with his client to dissuade the client from testifying falsely is burdened by a conflict of interest, is disloyal, is less than zealous, and is guilty of compromising the client's right to testify in his own defense. In arriving at this result, the panel has lost sight of the fact that

"the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington,* 104 S. Ct. 2052, 2069 (1984). Contrary to the panel's view, I have no difficulty in taking the position that a lawyer who insists upon truthful testimony is beyond reproach and his conduct is professionally reasonable. To hold otherwise is to foster "a breakdown in the adversarial process that our system counts on to produce just results." *Id.*

Whiteside has one fundamental complaint about his lawyer's performance: the lawyer insisted that Whiteside testify truthfully (that Whiteside thought his victim had a gun) while Whiteside wished to testify falsely (that he saw a gun in the victim's hand). Indeed, the panel acknowledges that Whiteside "would have testified falsely," and that the lawyer's actions "prevented [Whiteside] from testifying falsely." *Whiteside v. Scurr,* 744 F.2d 1323, 1328 (8th Cir. 1984). Nevertheless, the panel concludes "that counsel's action deprived [Whiteside] of due process and effective assistance of counsel." *Id.*

To prevent his client from committing perjury, Whiteside's lawyer told him "that if he insisted [on committing perjury], then he (counsel) would move to withdraw, advise the state trial judge that the testimony was perjurious and testify against him." *Id.* at 1326. Although this strongly worded admonition may have resulted in some degree of antagonism between Whiteside and his lawyer, I simply do not believe that a lawyer who, in the privacy of the lawyer-client relationship, admonishes his client to testify truthfully creates an actual conflict of interest. This conclusion is particularly compelling since a client has no constitutionally protected interest in testi-

fying falsely. Furthermore, even if the actions of Whiteside's attorney created a conflict, the panel points to no evidence which suggests that the lawyer's dialogue adversely affected either his performance or the underlying lawyer-client relationship. *Strickland,* 104 S. Ct. at 2067.

In fact, it appears that Whiteside received the zealous, faithful representation of a lawyer who did his best to prepare and present his client's defense. Further, the lawyer did nothing to prevent Whiteside from testifying, but rather allowed Whiteside to testify fully and only insisted that his testimony be truthful. Since Whiteside's testimony was truthful and uninhibited, it is difficult to understand how the panel concludes that the lawyer's actions "compromised Whiteside's right to testify in his own defense," *Whiteside,* 744 F.2d at 1329, particularly in light of the panel's recognition that "criminal defendants' privilege to testify in their own defense does not include the right to commit perjury," *id.* at 1328 (citing *Harris v. New York,* 401 U.S. 222, 225 (1971)). In my view, the panel's holding is at odds with the principle espoused in *Harris.*

The lawyer's reaction to Whiteside's announced intention to give false testimony was undeniably strident. In my opinion, however, the panel analyzed the lawyer's strongly worded admonition from a theoretical viewpoint without taking into account what actually happened after the lawyer told Whiteside that he would not tolerate perjurious testimony. Further, the panel overlooked the practicalities of effective communication between the lawyer and his client. The lawyer's choice of words should not disturb us. Rather, what is important is that the lawyer

effectively communicate with his client on a level the client can understand. In this case he did. As far as I can tell from reading the panel opinion and the trial transcript, the lawyer's threats had a singular impact on the trial—Whiteside did not tell a deliberate lie when he appeared on the witness stand.

I cannot accept the panel's conclusion that a lawyer, otherwise diligent and zealous in his representation, commits an "unprofessional error" solely because he insists that his client refrain from doing something the client has no constitutional right to do—commit perjury. In *Strickland,* the Supreme Court observed that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 104 S. Ct. at 2064. The panel opinion disregards the *Strickland* benchmark and totally ignores the lawyer's duty as an officer of the court to protect the integrity of our Nation's courts. False testimony on a crucial factual issue is not "evidence subject to adversarial testing" within the framework of a fair trial. *Id.* at 2063.

In affirming Whiteside's state court conviction, the Iowa Supreme Court stated:

> A defendant is entitled to present his defense and to an opportunity to testify fully and freely concerning any defensive matter. However, he has no right to commit perjury nor is an attorney permitted—much less required—to aid in such a purpose. Counsel owes a client charged with a crime honest, loyal, and faithful representation. However, this duty extends only to the use of fair and honorable means. A lawyer may never assist in the perpetration of a crime or countenance any other dishonest act.

State v. Whiteside, 272 N.W.2d 468, 470 (Iowa 1978). This pronouncement has a virtue. Criminal defense lawyers are told where they stand and assured that they can proceed with confidence to purge the deliberate lie from the trial record. This court should not shirk its obligation to provide the same affirmative guidance.

I find it hard to believe that a lawyer who nips perjury in the bud is "ineffective" within the context of the constitutional fabric. Rather, I believe the proper view is the one taken by the Seventh Circuit in the case of *United States v. Curtis,* 742 F.2d 1070 (7th Cir. 1984), in which that court concluded that a lawyer's refusal to allow his client to take the witness stand and commit perjury did not constitute ineffective assistance. *Id.* at 1076.

Hence, I note with dismay that the court has denied the petition for rehearing en banc.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX C

STATE of Iowa, Appellee,

v.

Emanuel Charles R. WHITESIDE, Appellant.

No. 61091.

Supreme Court of Iowa.

Dec. 20, 1978.

Considered by REYNOLDSON, C.J., and LeGRAND, McCORMICK, McGIVERIN and LARSON, JJ.

LeGRAND, Justice.

A jury convicted defendant of murder in the second degree for the stabbing death of Calvin Love. Defendant was sentenced to serve a term of forty years in the penitentiary under the provisions of § 690.3, The Code, 1977. He appeals from that judgment and we affirm.

The incident resulting in Calvin Love's death occurred following a controversy between defendant and the decedent over narcotics. The issues raised do not require a discussion of the facts. We refer to them when necessary in our consideration of this appeal.

Defendant raises three issues. One deals with instructions, one deals with the admission of evidence, and the third deals with the assertion that defendant was denied a fair trial because his counsel prevented him from presenting his defense in a proper manner.

[1] I. We deal with the last matter first. Defendant claims his victim had a gun and that he acted to protect himself from an assault by Love with that deadly weapon.

He says his attorney (not the one who now represents him) would not permit him to testify to that fact and threatened, if he persisted in doing so, to withdraw from the case and to advise the trial judge that this testimony was perjurious.

Defendant argues counsel prevented him from testifying "truthfully" to what would have been a good defense. The state says counsel's conduct was designed to avoid, not truthful, but untruthful testimony.

Throughout the early stages of this case, while defendant was awaiting trial, he maintained he "thought" Love had a gun but did not see one. Shortly before trial, defendant told his attorney he intended to say he *did* see a gun because without such testimony he was "dead." This precipitated the disagreement between defendant and his lawyer over defendant's testimony.

Defendant first raised this issue in a motion for new trial. An evidentiary hearing was held at which both defendant and the attorney, Gary Robinson, testified. So did Donna L. Paulsen, who was associated with Robinson in representing defendant. The trial court overruled the motion, and the evidence to support that conclusion is convincing.

[2,3] A defendant is entitled to present his defense and to an opportunity to testify fully and freely concerning any defensive matter. However, he has no right to commit perjury nor is an attorney permitted—much less required—to aid in such a purpose. Counsel owes a client charged with a crime honest, loyal, and faithful representation. However, this duty extends only to the use of fair and honorable means. A lawyer may never assist in

the perpetration of a crime or countenance any other dishonest act.

[4] A lawyer not only has an obligation to his client; he must also recognize his duty as an officer of the court. His oath as a member of the bar requires him to employ "such means only as are consistent with truth." By that oath he undertakes not to "mislead the judges by any artifice or false statement of fact or law."

[5] It is true that a lawyer's task is not to determine guilt or innocence, but only to present evidence so that others—either court or jury—can do so. A lawyer should not, therefore, decide what is true and what is not unless there is compelling support for his conclusion. *See U. S. ex rel. Wilcox v. Johnson,* 555 F.2d 115, 120 (3rd Cir. 1977). In the present case, counsel was convinced with good cause to believe defendant's proposed testimony would be deliberately untruthful. All the other evidence belied defendant's tardy claim. There were three other persons in the room. No one testified to having seen a gun. A search of the apartment shortly after Love's death did not disclose one. Even defendant says that during the argument Love told his girl friend to get his "piece"—meaning his gun. This refutes defendant's claim Love already had one. These circumstances, plus defendant's own statement (in the face of his contrary earlier version) that he *had* to testify that Love had a gun if he hoped to be acquitted, lends strong support to counsel's belief defendant did not see a gun and that he nevertheless intended to say that he did. Counsel properly refused to be a partner in such a dishonest and deceitful scheme. *See State v. Henderson,* 205 Kan. 231, 468 P.2d 136, 140 (1970) and authorities there cited.

There are several specific provisions in the Iowa Code of Professional Responsibility for Lawyers which vindicate counsel's action. Canon 4 obligates a lawyer to preserve the confidences and secrets of his client with certain exceptions including this one:

"A lawyer may reveal:

(1) • • •

(2) • • •

(3) The intention of his client to commit a crime and the information necessary to prevent the crime." (see DR 4-101(C), Code of Professional Responsibility for Lawyers.)

Canon 7 provides:

"A lawyer should represent a client zealously *within the bounds of the law.*" (Emphasis added.)

[6] A lawyer who knowingly uses perjured testimony or false evidence or who aids a client to commit a criminal act is himself subject to disciplinary action, not to mention the possibility of his own prosecution for suborning perjury. § 721.2, The Code, (now § 720.3, Supplement to the Code, 1977). *See also* EC7-5, EC7-26, and DR 7-102(A)(4), Code of Professional Responsibility for Lawyers.

We commend both Mr. Robinson and Ms. Paulsen for the high ethical manner in which this matter was handled. Defendant is not entitled to relief on his first claim of error.

II. Defendant raises a number of objections to the instructions, none of which have merit. We dispose of each briefly.

[7] He argues the instruction on premeditation is bad because it refers to the fact such premeditation need not exist for "any particular time before the act." Defendant insists this should have said "particular period of time before the act," instead of just "particular time before the act." We see no difference in the court's language and in that the defendant thinks is better.

[8] Instruction 12, defendant says, is objectionable because it permitted the jury to infer that he intended the probable and natural consequences of his act. This, he claims, shifts the burden of proof on an essential element of the crime to him. This, too, is without merit. The instruction as given follows closely Instruction 215 of the Iowa State Bar Association Uniform Jury Instructions. We disagree with these instructions reluctantly. *Ness v. H. M. Iltis Lumber Co.*, 256 Iowa 588, 593-94, 128 N. W. 2d 237, 240 (1964). We believe this instruction correctly states the law.

[9, 10] As to Instruction 13, defendant asserts this incorrectly defines manslaughter because it refers to "provocation" and "the heat of passion." He says manslaughter may be committed without such circumstances being shown. Indeed it might, but not under this record. Instructions should be patterned to meet the evidence. *Baker v. Wolfe*, 164 N.W.2d 835, 839 (Iowa 1969); *Gibbs v. Wilmeth*, 261 Iowa 1015, 1022, 157 N.W.2d 93, 97 (1968). The trial court's instruction on manslaughter was complete and correct under the evidence in this case. Perhaps an even better reason for denying relief on this ground is that the instruction given is in all material respects the same as that which defendant himself requested.

[11] Defendant says the instruction allowing the jury to infer malice from the use of a deadly weapon shifts to him an impermissible burden of proof, requiring him to rebut the inference. Once more defendant's contention is baseless. The use of a deadly weapon is a circumstance bearing on the presence of malice. The use of such a weapon may itself give rise to an inference, which the jury is free to accept or reject, that defendant acted with malice.

These issues concerning deliberation, premeditation, malice, and the inference arising from the use of a deadly weapon have all been resolved against defendant's present argument in *State v. Frazer,* 267 N.W.2d 34, 38-39 (Iowa 1978); *State v. Smith,* 240 N.W.2d 693, 695 (Iowa 1976); and *State v. Lass,* 228 N.W.2d 758, 766-67 (Iowa 1975).

Defendant also says the instruction on self-defense did not correctly inform the jury concerning his duty to retreat. We find no merit in this complaint.

In summary, we hold the instructions fully and fairly presented the issues to the jury, and we find no reversible error in them.

[12] III. Defendant's last assignment of error concerns the admission of a medical report. The only objection at trial was on the basis of materiality and hearsay. On appeal a new ground was asserted—lack of foundation. We generally refuse to consider matters raised for the first time on appeal. We follow that rule here. *See State v. Willis,* 218 N.W.2d 921, 923 (Iowa 1974).

IV. We find no reversible error and the judgment is affirmed.

AFFIRMED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 81-246-C

EMMANUEL CHARLES WHITESIDE,

Petitioner,

vs.

DAVID SCURR, Warden,

Respondent.

ORDER

Filed December 7, 1982

In an Order dated September 22, 1982, the Court asked the parties to indicate whether they would withdraw their motions for summary judgment and submit the merits of the above-captioned habeas corpus action on the record made in the state court proceedings. Both parties agreed to do so. The Court has received all of the state court transcripts and is now prepared to rule on the merits of the petition.[1] The facts stated in the September 22 Order need not be repeated here.

Petitioner first raised the issues which form the basis of this habeas corpus action by way of a supplemental motion for a new trial in the state trial court where he was convicted. After a hearing at which both petitioner and his former defense attorneys testified, the trial court

---

1. In its September 22 Order, the Court also raised a question concerning exhaustion. The parties' responses have persuaded the Court that there is no exhaustion problem.

denied the motion. In so doing, the trial judge noted that the testimony of petitioner conflicted with that of his defense attorneys in certain respects, and he concluded: "I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson [the defense attorneys]." An examination of the testimony of Paulsen and Robinson makes it clear that the foregoing statement constitutes a finding by the trial judge that petitioner would have perjured himself if he had testified at trial that he actually saw a gun in his victim's hand. This factual finding of the state court must be presumed correct in these federal proceedings unless the state court's determination is not fairly supported by the record. 28 U.S.C. § 2254(d) (8).[2]

This Court finds that the state court's determination *is* fairly supported by the record of the hearing on the supplemental motion for new trial; therefore, the burden is on petitioner to establish by convincing evidence that the state court's factual determination was erroneous. § 2254(d); *Sumner v. Mata,* 449 U.S. 539 (1981). As the parties have agreed to submit this case on the record made in the state court proceedings, the Court must look to that record to determine whether petitioner's burden is met. Having reviewed that record, the Court concludes that it has not been established by convincing evidence that the trial court's factual determination was erroneous. Therefore, this Court adheres to the state court's finding that the testimony petitioner was prevented from giving would have been perjured.

---

2. It does not appear that any of the exceptions enumerated in § 2254(d) (1)-(7) are applicable here.

Given this factual determination, it necessarily follows that petitioner is not entitled to habeas relief. Certainly, there is no constitutional right to perjure oneself, and it cannot be said that petitioner was denied a fair trial or the right to effective assistance of counsel simply because his defense attorneys prevented him from testifying falsely.

IT IS THEREFORE ORDERED that petitioner's application for writ of habeas corpus be and it hereby is denied.

Signed this 7 day of December, 1982.

/s/ W. C. STUART, CHIEF JUDGE
SOUTHERN DISTRICT OF IOWA

APPENDIX E

No. A-512

DAVID SCURR, WARDEN,

Petitioner,

v.

EMMANUEL CHARLES WHITESIDE

ORDER

UPON FURTHER CONSIDERATION of the application of counsel for the petitioner and the response filed thereto,

IT IS ORDERED that the mandate of the United States Court of Appeals for the Eighth Circuit, case No. 83-1015, be, and the same is hereby, further stayed pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this stay is to terminate automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue in effect pending the sending down of the judgment of this Court.

IT IS FURTHER ORDERED that the request by counsel for respondent for release on bail is denied.

/s/ Harry A. Blackmun
Associate Justice of the Supreme
Court of the United States

Dated this 17th day of January, 1985.

A true copy ALEXANDER L. STEVAS

Test:

Clerk of the Supreme Court of the United States
By Francis J. Carson

Chief Deputy

No. A-365

DAVID SCURR, WARDEN,

Petitioner,

v.

EMMANUEL CHARLES WHITESIDE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 16, 1985.

/s/ Harry A. Blackmun

Associate Justice of the Supreme Court of the United States

Dated this 13th day of November, 1984.

APPENDIX F

PORTIONS OF APPENDIX BEFORE THE IOWA SUPREME COURT

APPLICATION FOR PERMISSION TO WITHDRAW AS ATTORNEYS FOR DEFENDANT

COMES NOW, Thomas M. Horan and Timothy S. White, the Court appointed attorneys for the Defendant, Charles R. Whiteside in the above-referenced case and respectfully request that the Court allow them to withdraw as attorneys for the Defendant for the following reasons:

1. That the Defendant, Charles R. Whiteside has informed the Court that he wishes to have a different attorney appointed to represent him in the above-referenced case.

WHEREFORE, Thomas M. Horan and Timothy S. White respectfully request that the Court enter an Order appointing a new attorney for the Defendant, Charles R. Whiteside to assist the said Defendant in the preparation of his defense in the above-referenced case.

HEARING ON DEFENDANT'S REQUEST FOR APPOINTMENT OF ATTORNEY THOMAS KOEHLER

* * *

(Sup. Ct. App. 42) The Court: Well, we have two problems: first, a conflict between Mr. Platt and Mr. Koehler possibly arising out of the representation of two men involved in the charges arising out of the same set of facts. Now, I am not going to appoint Mr. Koehler if

there is a possibility of their being a conflict for the simple reason I've learned from long experience that you get into one of these and defendants start carving one another up and then an attorney has to withdraw. The Court must permit the withdrawal if there is a conflict, and so the Court has incurred on behalf of the taxpayers of Linn County substantial fees, and you have to appoint somebody else to do it. So I'm not going to appoint if there is a conflict of interest here; and, Mr. Whiteside, I'm not going to permit Mr. Koehler to represent one of the defendants and Mr. Platt to represent the other.

Mr. Koehler, have you discussed this with Mr. Platt, or what is your position on it?

(Sup. Ct. App. 43) Mr. Koehler: Yes, Your Honor, I have discussed this with Mr. Platt and I believe he does intend to represent Mr. Doolin in the event that Mr. Doolin is indicted by the grand jury, so there is a potential conflict.

The Court: Well, one of you is going to have to back off. I don't know which one. I don't care which one. But I don't want this thing of your getting in here and Mr. Platt's getting in here and then a conflict developing and then I find that I have to pay one of you gentlemen for substantial time which has, in effect, been wasted.

Mr. Koehler: I understand, Your Honor.

The Court: So I don't know how we resolve this. That's one thing—except by conference between you and Mr. Platt and Mr. Whiteside and Mr. Doolin. One of you or both of you can be in here, but you are not going to be representing different clients. I think you understand that. I think you appreciate that.

Mr. Koehler: I appreciate that, and I would state (Sup. Ct. App. 44) for the record that Mr. Platt, I believe, has worked on Mr. Doolin's. So-to-speak, he's in there first.

The Court: All right. Now, Mr. Whiteside, I've tried to explain to you the time before why I wouldn't do this. I had a case in this court about a year ago where two defendants had the same attorney and they were—that was what they wanted until we got right down to the nitty-gritty of the thing and then one of the defendants decided that the other one had led him into it and that it was the other guy's fault that he got involved, and that was right at the time of sentencing and he was trying to push that kind of a pitch to me—which may have been legitimate—but here was the attorney caught between these two people representing both of them. Now that won't do and I had to let the attorney withdraw from one of them and we had a substantial amount to pay because that attorney had devoted a substantial amount of time to both cases.

Now, that I can't let occur here so both you and Mr. Doolin are not going to be able to have Mr. Koehler and Mr. Platt.

(Sup. Ct. App. 45) Now, let me get to the second thing. Mr. Horan and Mr. White, how much time have you put in on this case to date?

Mr. Horan: Well, we've been present before this Court on three occasions. I have visited Mr. Whiteside at the jail on at least two occasions. Mr. White and I have discussed the case with Mr. Whiteside before and after these hearings at the courthouse here. There has been no depositions taken. I filed a Motion to Produce Evidence and a Motion to attempt to set up some depositions.

The Court: Can you give me a very rough idea of what your services and Mr. White's services would run to this date?

Mr. White: If the Court please.

The Court: Very roughly.

Mr. Horan: We would say ten or fifteen hours at the most.

The Court: All right, thank you.

Now, Mr. Whiteside, do you understand the situation?

The Defendant: Yes, sir.

(Sup. Ct. App. 46) The Court: Do you have some questions you want to ask me or Mr. Koehler or Mr. White or Mr. Horan? Now, anything you ask me you'll have to ask me on the record here, but if you want to talk with Mr. Koehler or Mr. White or Mr. Horan, all of them off the record, I'll permit you to do so; that is, talk to them privately.

The Defendant: I'd like to talk to Mr. Koehler first.

The Court: All right.

The Defendant: Off the record.

The Court: Yes, you may do so.

Mr. Blome, can you take them down to where Sandy is now holding fort? It's the court reporter's room, about the third one down the hall. You go down there and visit

with Mr. Koehler. Don't go far away, Harold or Mr. White.

(short recess was taken.)

The Court: Show that the defendant and all four attorneys return to the courtroom, the defendant having conferred with Mr. Koehler in private as per his request.

All right, now what's the situation, gentlemen?

(Sup. Ct. App. 47) Mr. Koehler: Well, Your Honor, I'll speak first. Mr. Whiteside did indicate that he wanted to talk to me. We did, in fact, go back to a private office here, and I again went over with him this idea of a potential conflict, a very potential conflict, and he still insists that he can't see a conflict, even a potential conflict arising. Now, is that correct, Mr. Whiteside?

The Defendant: Yes, sir.

Mr. Koehler: Even though we have tried to show him where it could happen and even given him examples of where it could happen, Mr. Whiteside still insists that there is no conflict and can be no conflict between Doolin and himself and Doolin's counsel and his counsel. That's about all we accomplished.

The Court: The Application for Withdrawal is denied. The Application for Appointment of Attorney is denied.

* * * *

(Sup. Ct. App. 48) Mr. White: I understand. Now, the problem, Your Honor, is this: Subsequent to this visit Mr. Whiteside now comes into court and says — meets me before the last hearing in the hallway and says,

"Mr. White, I don't want you as counsel. I don't want you or Mr. Horan as counsel under any circumstances. I want Mr. Koehler and I'm through with you people whatsoever," and I said now — I sat down with Mr. Whiteside and I explained to him that there was a potential conflict of interest; that we, in fact, had worked on this case; that we, in fact, had had experience handling the defense of murder cases. He reiterated time and again that he did not want us under any circumstances. His relatives then interjected themselves and they said they didn't want us under any circumstances.

Now, it seems to me under this whole frame of reference the problem that we have is this: We have a client who does not want us as lawyers, we are lawyers who don't want him as a client, and if we proceed in this matter, I can see under the grave circumstances (Sup. Ct. App. 49) that are involved, without getting into the facts, that if this man is convicted, he will then — the first thing that he will do is hire other counsel and he'll protest this Court's action as far as holding us in here against our will and against his will and we will all be in Federal Court under an inadequate of counsel allegation.

• • • •

The Court: All of the statements — That is all. All of the statements have completely ignored the taxpayers of Linn County and I'll bet you that the taxpayers of Linn County are tired of being ignored.

Mr. Whiteside and anyone else can select his own attorney when he is paying his own way, but Mr. Whiteside is not paying his own way.

Now, I will extend the time for the defendant to move, plead, or demur for a couple of more days. I will withhold my ruling on your Application to Withdraw then. I will retract my former statement and will withhold my ruling on that. And, Mr. Koehler, I would suggest that (Sup. Ct. App. 50) you talk with Mr. Whiteside then and see if there is some attorney whom Mr. Whiteside will accept, with whom you and Mr. Platt can work, if that is indicated in this case, and if there is somebody that Mr. Whiteside will accept other than you, perhaps I will permit the withdrawal of Mr. Horan and Mr. White and appoint somebody that's acceptable to Mr. Whiteside. I will not change my mind about appointing you to represent Mr. Whiteside while Mr. Platt is representing Mr. Doolin, and that is fine as far as I'm concerned.

(Sup. Ct. App. 51) PROCEEDINGS

(March 3, 1977, at 9:20 a.m.)

The Court: This is Cause No. CRF 3199-0277, The State of Iowa against Emanuel Charles R. Whiteside, Defendant.

This is the time for the defendant to move, plead, or demur, and he appears personally, and the State of Iowa is represented by Assistant Linn County Attorney, Harold Denton.

Now, I want the record to show that for almost the past hour I have been trying to contact an attorney. I have been trying to contact different attorneys who might be acceptable to Mr. Whiteside in this matter, the attor-

neys available being limited by conflicts of interest, and now I have contacted Gary F. Robinson.

Mr. Robinson: Gary L., Your Honor.

The Court: Gary L. Robinson, who is present in the courtroom. Mr. Robinson has conferred with Thomas L. Koehler, who was Mr. Whiteside's original request here, and Mr. Koehler informs the Court — and I guess he's informed Mr. Whiteside — that he can work in harmony and effectively with Mr. Robinson so long as there is no conflict between the interests of Mr. Whiteside and the interests of Mr. Doolin, who is represented by an associate of Mr. Koehler. And so I suppose you (Sup. Ct. App. 52) gentlemen, Mr. Robinson, Mr. Koehler, and Mr. Platt, will undoubtedly be cooperating on this case and that's why I want to make sure that it's someone that Mr. Koehler and Mr. Platt can work with, and they say they can work with you and will be happy to work with you.

Now, Mr. Whiteside has also had an opportunity to discuss this appointment with Mr. Koehler and with Mr. Robinson. And, Mr. Whiteside, now I ask you if I appoint Gary L. Robinson as your attorney in this matter is that going to be satisfactory to you?

The Defendant: Yes, sir.

The Court: Now, you understand that your chances of getting another change of attorneys are about zero? You understand that?

PORTIONS OF DEFENDANT WHITESIDE'S TRIAL TESTIMONY

(Sup. Ct. App. 65) A. It was — we was getting some glare from the outside like, from the window, a street light or something to that effect.

Q. You were able to make out shapes and—

A. Definitely, yes.

Q. Can you relate to the Court and to the ladies and gentlemen of the jury what happened next?

A. While I was standing there, Derrick was talking to Calvin Love, and Derrick asked Calvin, he say, "Why don't you give me some of the marijuana back? We can smoke it here. Give me part of it, anything." It was getting into a conversation about the marijuana. So Calvin seemed to have got, you know, got angry or something about it. So I didn't want any conflict to start. I say, "Well, just give us part of it. We'll sit right here and smoke it." So at that time he seemed to get more frustrated, got angry, and he told his girl friend, who was sitting across the room, he said, "Give me my piece," and I took that very close; it scared me. And I kind of stepped back, you know, and I thought for sure that he had a weapon.

Q. What happened after he said, "Get me my piece"?

A. When he said, "Give me my piece," Calvin stuck his hand under a pillow—

Q. What happened after that?

A. And at this time he just encountered me.

Q. What do you mean by "encountered"?

(Sup. Ct. App. 66) A. What do I mean by encounter?

Q. Yes.

A. I mean that he attacked me.

Q. He came off the bed at you?

A. That is correct.

Q. Were you still armed at this time?

A. Yes, sir, I was.

Q. And what happened?

A. When Calvin — when Calvin attacked me, I didn't see — there was no way for me to move. And Doolin was sitting on the bed like this. And I noticed — I just knew this man had a gun or something, and I couldn't get by, and he was already after me like this. So I kind of threw up my hand like this, and I kind'a pushed to get him back off me. The thing happened so fast. I actually — I don't know what happened, can't recall anything of what happened.

Q. But you did stab him, didn't you?

A. Yes, I did cut him.

Q. And this took place after he made the reference to getting his piece?

A. That is correct.

Q. Did you think that Calvin had a gun?

A. Most definitely I thought that.

Q. Why did you think that?

A. Because of Calvin's reputation, his brother's reputation, (Sup. Ct. App. 67) because of the prior conversation that Calvin and I had, I didn't have no other choice but to think he had a gun. And when he told his girl friend to give him his piece, I couldn't retreat. I couldn't do anything.

Q. What happened after the altercation between you and Calvin?

A. Everybody started moving, you know. And I'm frightened; I'm scared myself. And this girl say, "You want — you want your marijuana?" And I said, "Yes, give me my half." And she gave me my half and we left.

Q. Did you threaten that girl at any time?

A. No, sir, I did not.

Q. Did you say you were going to kill her?

A. No, sir, I did not.

Q. She's testified, and you heard her testify here in open court that you said you were going to kill her; is that testimony correct?

A. That testimony is false.

Q. Then the three of you left Calvin's apartment?

A. That is correct.

Q. What did you do with the knife?

A. When I was leaving out of Calvin's apartment, everybody started running. So did I. I was scared. I wanted to catch up with somebody so I could talk to somebody about what happened. I didn't know if I hurt Cal-

vin or what. I said — one thing that came to my mind, "Throw that knife * * *

PORTIONS OF DEFENDANT WHITESIDE'S TESTIMONY AT HEARING ON SUPPLEMENTAL MOTION FOR NEW TRIAL

(Sup. Ct. App. 68) Mr. George: I would call Mr. Whiteside to the stand, Your Honor.

EMANUEL CHARLES R. WHITESIDE,

the defendant, called as a witness in his own behalf, being duly sworn by the Court, testified as follows:

Direct Examination

By Mr. George:

Q. Charles, would you state your full name.

A. Emanuel Charles Ray Whiteside.

Q. And are you defendant in this matter before the Court today, cause No. CRF 3199?

A. Yes, sir.

Q. What's your age?

A. Twenty-seven.

Q. Your education?

A. Twelve years general.

Q. High school diploma?

A. Yes, sir.

Q. What kind of work experience have you had?

A. Teacher's aide and Merchants National Bank and plant labor.

Q. Have you spent any time in the penitentiary or reformatory?

A. Yes, I have.

Q. And how much time have you spent there?

A. Approximately three years.

Q. Okay. Were you tried earlier this year in regard — regarding (Sup. Ct. App. 69) the death of Calvin Love?

A. Yes, sir.

Q. And found guilty at trial?

A. Correct.

Q. On second degree murder?

A. Yes, that's right.

Q. Who was your attorney at trial?

A. Donna Paulsen and Gary Robinson.

Q. Were they the first attorneys appointed for you in that case?

A. No.

Q. Were they court-appointed?

A. Yes.

Q. Who were your first attorneys?

A. Horan and White.

Q. And why did they not represent you at trial?

A. I wasn't satisfied with them so I asked for a new attorney to be appointed to the case.

Q. Why weren't you satisfied?

A. Well, I don't have any reason why I wasn't satisfied. At the time I just didn't want Horan and White because at — from my knowledge, they used to be D.A. and I didn't feel comfortable with having them at all.

Q. They were associated with the attorney — or the

A. Correct.

Q —the County Attorney's office?

(Sup. Ct. App. 70) A. Yes.

Q. Were they associated at the time they were appointed to represent you?

A. Not to my knowledge.

Q. How did you come to have Mr. Robinson and Ms. Paulsen represent you?

A. Through Tom Koehler.

Q. And how did that occur?

A. I went over for — have an additional attorney appointed and asked for Tom Koehler. So he wasn't available at the time. So he recommended Gary Robinson to the case.

Q. And at the time that he made that recommendation, were both he and Mr. Robinson present?

A. Yes, they was.

Q. Was that in open court?

A. Yes.

Q. Who was your choice for an attorney in this matter?

A. Tom Koehler was my choice.

Q. Did you discuss the matter of the appointment of Mr. Robinson to represent you, with the Court?

A. Did I discuss the matter with the Court? Did I want an Attorney Gary Robinson to represent me?

Q. Correct.

A. Yes, I did. During that time, yes.

Q. At that time was it your understanding that Mr. Robinson (Sup. Ct. App. 71) would represent you at trial?

A. Yes. With my understanding also was he going to take the case on a part-time basis and Koehler was going to take over from there.

Q. And Koehler was going to take over from there?

A. Yes, this is my understanding.

Q. Do you recall exactly what was said to lead you to believe that that was what was going to happen?

A. No, because Attorney Tom Koehler was talking to me about it, and he say like, "I will take the case but Attorney Gary Robinson is going to lead it on."

Q. Was Mr. Koehler involved in something else at that time?

A. Correct.

Q. Do you know what?

A. No, I do not.

Q. Did you trust Mr. Koehler's judgment in the matter?

A. Yes, I did.

Q. When was your first contact with Mr. Robinson?

A. Humm. I'd say about a few days later after I met Gary — I met him first and I met Donna. I think Gary brought her over to the County Jail for me to meet her, if I'm correct. I think that's the way it was.

Q. Okay. When did you meet Gary Robinson?

A. I met him here at the courthouse over here at the courtroom.

Q. Do you recall when that was?

(Sup. Ct. App. 72) A. No, I can't.

Q. Can you tell me in relation to February 8 when that was?

A. I'd like for you to repeat that question so I can understand it very clearly.

Q. Okay. It's alleged in the County Attorney's True Information that the crime that you were tried for occurred on February 8, 1977.

A. Um-humm.

Q. In relation to that date, when did you first meet Mr. Robinson?

A. I can't recall.

Mr. Denton: Your Honor, if it would help things, perhaps we could just stipulate to that, because I'm sure

it's a matter of record as to the date Mr. Robinson was appointed. I'm sure it's a matter of record in the court file, if that would help things, because I certainly don't remember things—

The Court: Well, the record shows that on March 1 there was an Application For Appointment Of Attorney signed by Mr. Whiteside, apparently, asking the Court to allow Mr. Horan and Mr. White to withdraw and appoint Thomas Koehler. Then on that same date, Mr. Horan and Mr. White filed their Application For Permission To Withdraw, and on that same date — and that's March 1 of 1977 — in an Order signed by Judge Hyland, it's reflected that the defendant appeared with Mr. Horan and Mr. White. Mr. Denton was present representing the State, and Mr. Koehler was also present. It states, "For reasons shown of (Sup. Ct. App. 73) record, defendant's Application For Appointment of Thomas L. Koehler as his attorney is denied. Ruling for — on Application for permission of White and Horan to withdraw is reserved and time to move or plead is continued until March 3." Then on March 3, two days later, there is an Order signed by Judge Hyland reflecting that, "The defendant appears personally; Mr. Denton was present. Also appearing is Attorney Gary L. Robinson. Defendant indicates that he wishes Gary L. Robinson appointed as attorney to represent him in this matter, and after discussion on the record with defendant and Gary L. Robinson, the Court appoints Gary L. Robinson, Attorney, to represent defendant at expense of Linn County, Iowa, and the request of Mr. Horan and Mr. White to withdraw is granted." Now that occurred on March 3. So there were apparently two appearances in court in con-

nection with that matter: March 1, when Mr. Koehler was there; March 3, when Mr. Robinson was there and was then appointed. And then the record further shows that on March 8 Mr. Robinson filed an Application requesting that Donna Paulsen be appointed to assist him, and an Order was entered March 8 appointing Donna Paulsen, that also by Judge Hyland. Does that help?

Mr. George: Yes, Your Honor.

By Mr. George:

Q. Does the Court reading from the court file agree with what you recall in this matter?

A. Yes.

(Sup. Ct. App. 74) Q. Was she present?

A. No.

Q. Did you have occasion to discuss these matters again at any later time?

A. Yes.

Q. I'm sure you're familiar with what you said. Could you go over exactly what you said from the point of your being in Love's apartment for the second time on the 8th?

A. You want to know of the incident itself, right?

Q. Right. But I'm more interested in whether a weapon was involved, and I'd like for you to start just prior—

A. Okay. From Calvin Love's apartment.

Q. —to the stabbing. Right.

A. I was in Calvin's Love's apartment with two other — two other mens, Derrick Doolin and Terry Fowler, and we were discussing about some marijuana that Calvin owed me part of the marijuana. And so Calvin was intoxicated. I couldn't say what he was intoxicated on, but I know he had been drinking some alcohol, and I know that he shot heroin and so forth. But I couldn't tell. But anyway, we was discussing about the marijuana. And so Calvin got very upset. But any — but I wasn't talking to Calvin. Doolin was. And I was standing over behind Doolin. And so he got very upset with Doolin, and just like he wanted to have a hassle with Doolin. So I didn't want anything to do—

(Sup. Ct. App. 75) Q. When did you first have an opportunity to discuss this case with Mr. Robinson?

A. At the Linn County Jail.

Q. Was that after the appearances in court?

A. Correct.

Q. So it was sometime in March?

A. Correct.

Q. And at that first meeting at the Linn County Jail, what occurred between you?

A. We kind of went over the -- what happened and so forth, and that was about it really.

Q. Was that the first time that you relayed to Mr. Robinson what occurred?

A. Yes.

Q. And at that time what did you tell him with regard to weapons involved in the crime?

A. Well, I told him exactly what happened in the crime, and that I also saw weapon in Calvin's hand, and nothing, you know, took place at this time.

Q. And this would have been in early March?

A. Correct.

Q. Was this prior to the time that Donna Paulsen was appointed to be co-counsel for you?

A. I can't recall if she was appointed — yeah. Well, yes, I can say yes that she was appointed at the time, yes.

(Sup. Ct. App. 76) The Court: I'm sorry. What?

A. Like he wanted to have a hassle with Doolin about it. So I didn't want anything to go down on my behalf with Doolin with Calvin, so I kind of interrupted the conversation, and I said — well, I said — Calvin kind of moved in front of Doolin like this (indicating), and I say, "Well, Calvin, why don't you give me one or two joints or something, and we just sit here and smoke it or just leave." So he got — by that time, by me butting in — he was already hot — he just got really upset. So he told his girl friend, he say, "Give me my shit." And from the — from the stimulation of the — what conversation that we was having in the house, I know that's all he was talking about was a weapon when he say, "Give me my shit," you know, because him being so angry he wasn't talking about nothing else. And so the girl didn't move, to my knowledge. Was not to look around, because this guy could just bust my head if I turned my attention to this girl like this. But so when I was — when he said that, I kept — I was standing there like this, and Calvin reached underneath his pillow and he

pulled out a weapon in his hand. So my reaction was to — was to charge Calvin. But he jumped from the bed. When he pulled out the weapon he moved, he moved into me. And so I kind'a held my hand to keep the weapon away from me. Then I remember having a knife in my pocket, and I tried to warn Calvin so he wouldn't have to (Sup. Ct. App. 77) shoot all of us in that apartment, because I knew he was intoxicated, and he was drunk or high over some dope or something.

Q. What kind of weapon did he have?

A. I couldn't specify the type of weapon he had.

Q. Could you see the shape of it?

A. No. What I saw in Calvin's hand was something like when he pulled it out like this (indicating). I didn't see nothing else like a knife or something pointing, because he couldn't hold a whole knife in his hand. But when he went under the pillow and pulled it out, I saw it here. I saw the weapon here. (Indicating.) And so when he come toward me like that, so I kind of keep him away like this (indicating) and that was it.

Q. What did you think it was?

A. I knew it was a pistol. I had no doubt about it.

Q. And did you tell Mr. Robinson that on the first occasion—

A. Yes, I did.

Q. —that you talked to him about the facts of the case?

A. Yes.

Q. Did you tell Donna Paulsen the same thing the first time you discussed the facts of the case with her?

A. To my knowledge I — I don't know if I did or not. I'm not going to say I did. But if — I think I did. I'm not going to just put total confidence in saying I did, but I think I (Sup. Ct. App. 78) did.

Q. Early in your relationship with Mr. Robinson did he request that you prepare a written statement for him?

A. Correct.

(Defendant's Exhibit A was marked by the reporter.)

Q. I hand you what's been marked as Defendant's Exhibit A and ask you whether you can identify it.

A. Yes, this is my handwriting.

Q. And what is that document?

A. This is a statement that I written out to Tom Koehler. This is my handwriting here. I wrote this myself to Tom.

Q. Did you write that at the request of Gary Robinson?

A. No. I think I wrote this in a cell house, and I had this ready for Gary, I think — for Thomas, excuse me.

Q. When did you write—

The Court: Pardon? I didn't quite catch—

The Witness: For Thomas Koehler. I had this prepared for him.

Q. When did you write it?

A. It's dated February 28, '77.

Q. And is that the date that you wrote the statement on?

A. Yes.

Q. Was that prior to the time that Gary Robinson was appointed to represent you?

A. No.

(Sup. Ct. App. 79) Q. Are you certain that that wasn't prior to the time that Mr. Robinson was appointed to represent you?

A. Well, this was — this was before. Even Gary wasn't even in the — wasn't even being thought about at the time.

Q. Okay. So it was before he was appointed by the Court?

A. Yes, correct.

Q. And did you make that statement available to anybody?

A. Nobody but Tom Koehler.

Q. Did you ever give a copy of it to Gary Robinson?

A. Not this, no.

Q. Now in that statement that you've prepared there, did you relate the same thing that you previously related here with regard to weapons being involved in the crime?

A. Correct.

Q. Who did you give that statement to?

A. Thomas Koehler.

Q. And when did you give it to him, if you can recall?

A. I can't recall the exact date when I gave it to him.

Q. How did you make it available to him?

A. He — I think he was over at the jail visiting me, I think, and I think that's where I gave it to him at.

Q. You didn't mail it to him?

A. No.

Q. Did you know that Mr. Robinson had a copy of that statement?

A. No, I didn't.

(Sup. Ct. App. 80) Q. What was Mr. Robinson's response to your statement that Calvin Love had a gun just prior to the stabbing?

A. When I first — when I first indicated to Mr. Robinson about the weapon, his response was that, "We have a good case to argue," and this is about the general way it was about.

Q. Okay. He didn't take issue with the fact there was a gun involved at that time; is that right?

A. No, not at the time, no.

Q. Is this the first time that you told him the story that you're talking about now?

A. Yes.

Q. Did his position regarding the gun subsequently change?

Q. And how did it change?

A. When it got close — when it got close to trial, somewhere like about two weeks before trial, I got — I got very nervous about coming to trial, because there was no weapon, you know, was present. And so I indicated to Attorney Gary Robinson, I say, "I don't think we should go to trial right now because we should produce this weapon. This is my only proof that I have." And he — his response was that, "Well, there's just no weapon. We just can't find a weapon. There's no weapon involved anywhere. We just can't find one." So I was just left right there, you know.

Q. Did you go over the questions that Mr. Robinson would ask you (Sup. Ct. App. 81) at trial, before the trial?

A. Yes.

Q. And as you went over the questions, did the two of you come into conflict with regard to whether or not there was a weapon?

A. I couldn't — I couldn't say a conflict. But I got the impression at one time that maybe if I didn't go along with — with what was happening, that it was no gun being involved, maybe that he will pull out of my trial.

Q. Did he ever tell you he would not represent you if you maintained that a gun was in the possession of Love just prior to the stabbing?

A. I can't recall that, if he did. But my impression was that he was going to.

The Court: Miss Houg, would you go back and read to me the answer he gave that started out, "I got the impression." (Lines 6 through 14 were read by the reporter.)

Q. Did Mr. Robinson ever make any kind of a statement in that he would withdraw or he wouldn't represent you if you maintained a gun was involved in the crime?

A. No. He indicated that to me, did I want him to withdraw from the case.

Q. He asked you that question?

A. Yes.

Q. And when did he ask you that question?

(Sup. Ct. App. 82) A. He asked me that question over at the jail, and I can't recall the exact date when it was, but those was his questions to me.

Q. Do you recall whether it was shortly before trial?

A. Yes, it was.

Q. What do you mean by "shortly before trial"?

A. Somewhat like about a week and a half, maybe two weeks at the most.

Q. And at the time he asked you that question, what were you discussing with him?

A. My main concern at the time was the weapon that Calvin had, and that's what we was discussing.

Q. Is there any doubt in your mind that Calvin Love did have a gun on the 8th?

A. Was there any doubt in my mind that he had a gun?

Q. Right.

A. Yes, I knew he had a gun. (Sup. Ct. App. 83) I did. But, you know, I can't recall if I did tell her. But I am sure that I told her about the incident that I indicated the weapon. But I can't recall. My memory is not that well from that time.

Q. And as I understand it, you had told them about the gun, and was it just Mr. Robinson that told you not to mention the gun?

A. Yes. No, Ms. Paulsen wasn't nowhere involved at the time, no.

Q. Okay. So Mr. Robinson told you to say just that you thought you saw a gun?

A. Yes, correct. Because no weapon was found.

Q. And you believed at one time that Tom Koehler was going to be your lawyer; is that right?

A. That was my belief.

Q. Well, when did you figure out that Mr. Koehler wasn't going to have anything to do with it?

A. Well, we went so far into the trial, and what Gary came and told me, he was going to be my lawyer, you know, and so I was still under the influence that Koehler was going to just take over, but I did never think he was just going to total — wasn't going to be my

lawyer at all. But I never did think that he would just — just put me off and that was it, you know.

Q. Well, now didn't Judge Hyland explain to you as — do you remember Judge Vietor just read — we're talking about what date you first saw Mr. Robinson, and Judge Vietor read that (Sup. Ct. App. 84) Judge Hyland denied the appointment of Thomas L. Koehler and he appointed Gary Robinson. Do you remember that?

A. Yes, I remember that.

Q. Don't you remember that at that time Mr. Koehler stated that Mr. Platt was representing Mr. Doolin, or I believe it was Mr. Doolin, and that Mr. Koehler could never represent you because interests were conflicting; don't you remember that?

A. Yes, I remember. But also it was — it was some other conflict that was involved too. It was something like it was two lawyers in the same office or something, the reason why Doolin like this — okay, but to say one lawyer was going to go — Doolin was not going to have this lawyer, something like this, and Koehler — Koehler and I was having a conversation, and he was telling me, he said, "Well, Gary is going to open the trial up and I'm going to come in." So I was under the influence that Koehler was going to come in at all times.

Q. Well, from March 3rd on, you never saw Tom Koehler once?

A. No.

Q. Now did you ever indicate to anyone that you were dissatisfied with the representation that Mr. Robinson gave you?

A. Well, no. I thought that — my interpretation of the lawyers, that they was doing a good job, you know, until they come and told me that we couldn't have — we didn't have no weapon; we can't produce a weapon, you know. And (Sup. Ct. App. 85) I was going to do the same thing with Tom Koehler. This weapon had to be produced.

Q. Now you indicated that until the weapon thing came up, you were satisfied with what Mr. Robinson was doing?

A. Totally satisfied.

Q. Now it is — it is true though that you — do you recall that shortly after we argued the case and the jury left the room that Judge Vietor asked you if you were satisfied with your lawyers?

A. Um-humm.

Q. And didn't you tell him you were?

A. Yes.

Q. And isn't it fair to say that your dissatisfaction with your lawyers dates in fact from the time the jury returned the verdict?

A. Repeat that for me again.

Q. Isn't it a fact that your dissatisfaction with your lawyers dates from the time the jury returned the verdict, that's when you were dissatisfied with your lawyers?

A. No, no. Not at all. Because when we couldn't produce that weapon, I was just — I was all dazed from the total beginning when we first talked about that wea-

pon. I was just going through court hoping that maybe that what he told me, like "Just say you thought he had a weapon," and you go on this assumption, well, I thought maybe at that time, well, everything's (Sup. Ct. App. 86) — everything is already — is already fixed, you know, just like a weapon is being there, that he had everything altogether for me.

PORTION OF ATTORNEY GARY L. ROBINSON'S TESTIMONY AT HEARING ON SUPPLEMENTAL MOTION FOR NEW TRIAL

(Sup. Ct. App. 87) Q. Gary, would you state your full name?

A. Gary Leo Robinson.

Q. And your occupation?

A. I'm an attorney.

Q. How long have you practiced law?

A. Oh, a little in excess of three years — four years. Excuse me.

Q. Are you acquainted with Emanuel Charles R. Whiteside?

A. Yes, I am.

Q. Did you represent him earlier on a murder charge this year?

A. Yes, I did.

Q. Were you retained in that matter?

A. No, I was not.

Q. Were you requested by Mr. Whiteside as court-appointed counsel?

A. Well, the way that came about, I was in the courtroom — excuse me — the courthouse on March 3rd with a Mr. Wardell Dillon, a client of mine, and we were to appear in front of Judge Hyland. And this was something — there were people milling around out there, and Mr. Denton indicated that they were trying to find counsel for Mr. Whiteside, who had been charged with murder. Mr. Koehler came out and said that he had a conflict of interest, and would I be willing to represent Mr. Whiteside. He said he'd introduce me, and if it was all right with Charley, then it would be all right with him. So Mr. Koehler and I went back and talked to (Sup. Ct. App. 88) Mr. Whiteside, and he indicated that would be fine with him. And I advised Judge Hyland that I would be willing to represent him.

Q. Did this all occur on March 1st?

A. No, this all occurred on March 3rd. That was the first time I had ever met Mr. Whiteside.

Q. When did Mr. Whiteside relate the facts of the incident resulting in Love's death to you?

A. The same day Judge Hyland appointed me and gave us, I believe, an additional five or six days to move, plead or demur. And as soon as that was completed, I went over to talk to Mr. Whiteside in the Linn County Jail, and he presented me with the five-page statement, which has been introduced into evidence here today.

Q. Okay. So the same day you were appointed you got that statement from him?

A. That's correct.

Q. Approximately how many times did you discuss the matter of the facts in this case with Mr. Whiteside?

A. Checking my time sheets, I represented Charley approximately 69 days, and the time sheets indicate that I saw him at least 23 times, so I was seeing him about once every three days.

Q. And those 23 times were at the jail?

A. They would be mostly at the jail. There would be occasions (Sup. Ct. App. 89) when I would see him prior to a hearing or after, something of that nature, where we would tell him either what was going to happen or what had happened with respect to procedural matters concerning his case.

Q. How often did Ms. Paulsen go with you to the jail?

A. Not very many.

Q. What did Mr. Whiteside tell you with regard to Calvin Love having a weapon prior to the time he was stabbed?

A. Well, the first thing I did was read the statement. Could I have the statement please. And the statement caused me considerable consternation. Because the way I interpreted the statement, it amounted to a confession to first degree murder. And I asked Charley particularly about the matters as were related on page 4,

the top of the page, starts out, "She didn't move. I turned back to Calvin, which he was pulling a pistol from underneath the pillow on the bed, which he way laying on. At this time I reacted. I stabbed him, I thought in the shoulder, he still reaching, I stabbed him again." Now my interpretation of that was that he had stabbed Calvin Love twice while Calvin was sticking his hand under a pillow. That's the way the thing reads. Now he indicated to me at that time that, well, he had sort of had a little help preparing this statement and that the words in here weren't 100% his. And I said, "Well, okay, that's fine. Let's ditch the statement. And what happened in your (Sup. Ct. App. 90) own words?" He related what happened. I ask him if he saw a gun. He indicated that he did not but that he was convinced Calvin had a gun, because he had known Calvin before. They had served time together. And in his own mind he was convinced that Calvin Love had a gun or weapon. I said, "Well, we'll have to see one way or the other. It's important to know." But that the mere factual existence of a gun would not destroy a self-defense case. And subsequently to that we did investigate. I was in the building where the incident occurred in Calvin Love's room, conducted a search. We talked to everybody that was there that night. We talked to the building manager. There was no gun.

Q. Did Charley say who helped him prepare the written statement?

A. Yes. Mr. Dillon.

Q. Did he say what effort — what Mr. Dillon put into the statement?

A. Mr. Dillon's part in the statement, I gathered, was structuring it in a proper fashion. And I advised Mr. Whiteside that I — one, I never wanted to see anything in writing from him again, because when you write something in the jail the chances of it ending up in the hands of the jailer are very good, or in the hands of another prisoner, and if he wrote something like that, it could come back to haunt him. And so I just said that it's not a good idea to write that. I said, "If you have any questions, you call me and we'll talk (Sup. Ct. App. 91) about them. But," I said, "I don't want anything in writing because it will turn up at a later time."

Q. In the version of what happened that Charley gave you, after you received this letter, did he indicate the same thing that he had stated in the letter?

A. No. Charley's version of the events was basically the same throughout: That he was convinced in his own mind that Calvin had a gun. But he had never actually seen it. And that is consistent with the events as set out in the letter.

Q. At what point in time did you investigate, including going to the scene of the crime and talking to the people who were there?

A. I went to the scene of the crime, I believe, within two or three days after I started representing him. And then we talked to all the people that were there, by way of depositions, and those took—it took some period of time to do them. I know it took two full days and part of another day, and that was probably three weeks to a month later. And then I spoke with Mr. Fowler and Mr.

Doolin off the record, and Mr. Fowler was never deposed. Mr. Doolin was deposed, but he was deposed by the State.

Q. Okay. Your investigation was almost a month after the incident then on the 8th?

A. Well, my investigation in talking to the people was. My investigation of the building was not. It was very close (Sup. Ct. App. 92) to the time of my appointment.

Q. Approximately how soon after the crime was committed were you appointed?

A. Let's see. Calvin was murdered on the 8th of February, and I was appointed on March 3rd. Whatever number of days elapsed there.

Q. What steps did you take in your investigation of the scene?

A. We went into the building, went downstairs and talked with the manager, to ascertain which apartment Apartment M was, and where it was at. The manager accompanied us upstairs, and we observed that the door was locked. I believe he had to go look for some keys or something. He opened the apartment, and we went in. We were probably in the apartment, I would say, half hour to 45 minutes. We also talked with Mr. Stout, who subsequently was a witness, at that time also.

Q. In your conversations with the investigating officers, did you discover the apartment had been broken into after it was sealed by the police?

A. Yes.

Q. And when did that occur?

A. That occurred after Officer White, who had responsibility for securing the building, had completed his investigation and had locked the door to that apartment. And he had simply left the key with—I believe one of the captains, for Kathy Sauer to pick up. Officer White indicated that there (Sup. Ct. App. 93) was nothing further to do as far as the police were concerned. Their investigation was complete. Kathy Sauer indicated that she didn't have a car to go to the police station. So she authorized or told Mr. Stout to simply break in the door so they could move Mr. Love's and her stuff out of the apartment.

Q. That was all prior to your investigation in connection with the case?

A. That's correct.

Q. From all you've learned about this case, was there an opportunity for a gun to be disposed of after the crime?

A. In my opinion, having talked to the people that were there, I would say no. I base that opinion on several things: First, Kathy Sauer testified concerning the various times that things happened with respect to this case. She first indicated that Mr. Whiteside and Mr. Love came back to the apartment sometime prior to 10 o'clock on February 7. She based that on the fact that there was a T.V. movie on. The girl who played Rhoda was in it. She was correct, there was one on. Valerie Harper was in it. It was on NBC and it started at 8:30 and ended at 10:00. She said that Mr. Whiteside was there approximately 15 to 20 minutes; when he left, the news was still on. She then testified that he came back at 2:15, or there-

abouts, because she looked at the clock. That the incident itself happened very quickly. The police (Sup. Ct. App. 94) testified, all of the officers who were dispatched to the scene, that the calls came in at approximately 2:16 or 2:17, which supported Kathy Sauer's version at least as to the times. Now for her to have gotten rid of the weapon would have required considerable more foresight on her part than she exhibited either at the deposition or at trial. At the trial she wasn't sure whether she was in front of the grand jury, the district court jury or what. She didn't recall whether she'd ever seen me before. She just sort of knew what had happened that evening and that was really about it. The officer who investigated, Officer White and Officer Kinkead, had gone over the apartment and had looked under the bed and looked under the pillows, things like that, with the idea of trying to find the knife that had been used to kill Calvin, but they had not observed any other weapons or anything of that nature. Kathy Sauer had indicated that she pulled open one drawer of the cupboard or chest of drawers to give the marijuana back to Mr. Whiteside when he demanded it. Officer White testified that there was one drawer of the chest of drawers open at the time he came back for his investigation. From that I simply drew the conclusion that the events had happened pretty much in the sequence Kathy Sauer had indicated and that they happened fast enough that she did not have time to even close the drawer from which she had taken the marijuana out of.

(Sup. Ct. App. 95) Q. How many times have you represented persons charged with murder?

A. This was the first time.

Q. Have you had any experience in investigating criminal matters?

A. Yes.

Q. And what experience have you had?

A. Every criminal case I've done for the last four years I have investigated.

Q. Okay. And approximately how many criminal defendants have you represented?

A. Upwards of 40.

Q. Have you ever used a professional investigator in any case?

A. Once. First criminal case I had.

Q. Did you use a criminal investigator in this case?

A. No.

Q. Can you tell me why you did not?

A. First criminal case I had involved some tire slashings and carrying a concealed weapon in Waterloo, Iowa. I employed a professional investigator to check out, to get me witnesses who might have seen what had happened, to talk to the various people involved, to get a copy of police report and to give me a written report. Three weeks later I was still asking for those same things. I decided I could do it better myself.

Q. When you say that you represented 40 criminal defendants, have you gone to trial on 40 cases or is that the total (Sup. Ct. App. 96) number of criminal—

A. That would be the total number.

Q. Do you know how many of those cases went to trial?

A. Felony or misdemeanor?

Q. Felony.

A. I would say eight to ten.

Q. Do you recall having a discussion with Charley just prior to trial or within two weeks of trial concerning his testimony?

A. I had discussions with Mr. Whiteside in the two weeks before trial practically daily. Most of them would have been concerning either what his testimony was or what we anticipated other people's testimony was going to be.

Q. At any time did you have a conflict with him with regard to what he was going to testify to?

A. No.

Q. Did he indicate at any time that he intended to testify that he did see a gun in the possession of Calvin Love just prior to the stabbing?

A. No. He indicated that he wanted to say that. He did not indicate that he had actually seen one.

Q. And he said this just before trial?

A. As I recall, on May 3rd and on May 4th, Ms. Paulsen and I had gone to the county jail where Mr. Whiteside was, for the purpose of explaining to him one more time what the plea bargain was, or what the proffered plea bargain was, what the (Sup. Ct. App. 97) State would probably use as evidence against him, what we

thought the outcome would be. Then I went over the written questions that I had prepared and Donna critiqued them, just simply whether his testimony sounded believable or not, grammatical errors, errors—for instance, he said in response to one question that he was pissed off at Calvin. And we asked him if he really wanted to say that in front of the ladies and gentlemen of the jury, and he indicated that no, he probably didn't. In the course of that he made reference to seeing something "metallic" I think is what he said. I don't think he ever did say a gun. And at the end Donna asked him about that, because that was the first time it had even been mentioned either to her or to myself. His response to that was, "in Howard Cook's case there was a gun. If I don't say I saw a gun, I'm dead." I explained to him at that time that it was not necessary that the gun be physically present for self-defense, one; two, that to say that would be perjury on his part because he had never at any time indicated that there was a gun, and that he was just simply saying it now to us because he felt if he didn't say it he'd be convicted; three, that we could not allow him to do that because that would be perjury, and as officers of the court we would be suborning perjury if we allowed him to do it; four, I advised him that if he did do that it would be my duty to advise the Court of what he was doing and that (Sup. Ct. App. 98) I felt he was committing perjury; also, that I probably would be allowed to attempt to impeach that particular testimony. I told him that there was no need for him to lie about what had happened, that he had a good and valid defense on the facts as he had related them to us, and we felt we could present a good self-defense case on the facts he had stated to us.

Q. You say that the first time that he mentioned a gun was just prior to trial in your preparation?

A. Other than in the letter, and the reference there was simply as it had been during the course of the preparation: That he knew Calvin had a gun. And he testified at trial that he knew Calvin had a gun. What we're talking about here is the difference between actual and constructive knowledge. Charley in his own mind was convinced that Calvin had a gun. Well, that would be similar to me being—standing in a darkened—or standing in a room with no windows and seeing you come in covered all wet. I would know in my own mind that it's raining, but until I actually go outside and see it, I don't have any actual knowledge that it's raining, and that was the situation we were in with Charley. Constructively he knew Calvin Love had a gun, but he actually did not.

Q. He never described anything such as he described here today with regard to something in Charley's hand when he pulled it out from under the pillow?

(Sup. Ct. App. 99) A. No.

Q. But he had mentioned the pillow?

A. He had mentioned that Calvin's hand had gone under the pillow.

Q. But other than in the letter, he never mentioned that he pulled his hand out?

A. He indicated that Calvin had attacked him. And I asked him that, "Well, when he attacked you he would have had to have been coming at you front-on, because the stab wound was right in the center of the chest." And he

said that was correct. And I said, "Well, did you see anything at that time?" And he said, "No." He said, "It happened too fast."

Q. In your experience do you think that this case would have been stronger in terms of a defense had a gun been found?

A. Yes.

Q. But since no gun was found, do you think that it would have weakened the case for Charley to take the stand at trial and say that there was a gun?

A. Not if that's what he saw, no.

Q. And in terms of the effect on the fact findings, would it—do you think that it would have weakened the case?

A. I don't think so. I think it would have strengthened it. Because, for one thing, we tried to create a gun. We tried to manufacture one practically out of nothing. We found two people, Wardell Dillon and Officer Mike Birmingham, who had seen Calvin Love with a gun at one time. Dillon had seen (Sup. Ct. App. 100) him as late as '76, and Birmingham had seen him with a sawed-off shotgun. Both people were called. And we were able to get the State to stipulate that Love had been arrested in Linn County, had been convicted in Linn County of carrying a concealed weapon, and that that weapon had been a sawed-off shotgun. We also sort of attacked Officer White because he didn't open all the drawers of this chest of drawers, and because the apartment had been cleaned out, with some sort of innuendo that there was a gun. So we

were trying to create in the mind of the jury that, "Sure, there was a gun there."

Q. When the matter came up that Charley was planning to say at trial that he actually saw a gun, did you at any time indicate to him that if he did that you would withdraw as his counsel?

A. I told him that I would advise the Court that I thought he was going to commit perjury. That if he did do that, that I would ask the Court for permission to withdraw based on that. Under the Canons I simply couldn't be part, you know, of any kind of action of that nature.

Q. Did you discuss that matter any further than you've already indicated today?

A. No, that was the only time it came up.

Q. Do you recall approximately when this was in relation to the trial?

A. It was either May 3rd or May 4th.

(Sup. Ct. App. 101) Q. And the trial was?

A. May 9.

Q. At trial did you ask Charley whether or not Calvin Love had a gun, actually had a gun?

A. I think the question was, "Did you think Calvin Love had a gun?" I believe the response was, "Yes." In fact—and there was another question, and he said, "Yes, I knew he had a gun."

Q. But he wasn't asked the question directly whether or not he saw a gun?

A. No, he was not. I take that back. Mr. Denton asked it to him, and he said no, he didn't see a gun. But that was on cross-exam.

Q. Prior to the time that question was asked, you had discussed this matter with him and the things that you've indicated here today had transpired?

A. Yes, that's correct.

Q. After you discussion with Charley with regard to what you would have to do if he did take the stand and say that he saw a gun, were you convinced by him that he was going to testify that he only thought he saw a gun?

A. I wasn't sure whath e was going to do because, as I recall, that conversation we sort of just left it right there, and then said, "You know, we'll be back tomorrow and you let me know." And as I recall, we came back the next day and went (Sup. Ct. App. 102) over the questions again, and he just dropped it entirely. He didn't bring it up again.

Q. Do you feel that your conversation with him with regard to the possibility of perjury and what you would have to do as the result of that, influenced him in terms of what he did say at trial?

A. I'm sure he did not want me going to Judge Vietor and telling Judge Vietor that I thought he was committing perjury.

Q. So you do think that that did influence him?

A. I think it forced him to tell the truth, yes.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(1)

ORIGINAL

Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1321

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

RESISTANCE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Patrick R. Grady
Assistant Public Defender
214 First St. S.W.
Cedar Rapids, Iowa 52404
Phone: (319) 398-3690

March 13, 1985

QUESTIONS PRESENTED

1. Whether the ineffective assistance of counsel holding of the Federal Court of Appeals is consistent with the holdings of the majority of courts who have addressed the issue.

2. Whether Respondent's right to testify was violated by trial counsel's conditioning further representation and confidentiality on the content of that testimony.

3. Whether the limited holding of the Court of Appeals makes it unnecessary to further explore the questions raised by Petitioner.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

TABLE OF AUTHORITIES..... ii

CONSTITUTIONAL PROVISIONS INVOLVED..... 2

STATEMENT OF FACTS..... 2

REASONS FOR DENYING THE WRIT:

I. THE INEFFECTIVE ASSISTANCE OF COUNSEL HOLDING OF THE FEDERAL COURT OF APPEALS IS CONSISTENT WITH THE HOLDINGS OF THE MAJORITY OF COURTS WHO HAVE ADDRESSED THE ISSUE..... 5

II. RESPONDENTS RIGHT TO TESTIFY WAS VIOLATED BY TRIAL COUNSEL'S CONDITIONING FURTHER REPRESENTATION AND CONFIDENTIALITY ON THE CONTENT OF THAT TESTIMONY..... 8

III. THE LIMITED HOLDING OF THE COURT OF APPEALS MAKES IT UNNECESSARY TO FURTHER EXPLORE THE QUESTIONS RAISED BY PETITIONER..... 10

CONCLUSION..... 11

TABLE OF AUTHORITIES

Cases:

Alicea v. Gagnon, 675 F.2d 913 (7 Cir. 1982)..... 8

Butler v. United States, 414 A.2d 844 (D.C.Cir. 1980)..... 7

Commonwealth v. Wolfe, 447 A.2d 305 (Pa.Sup. 1982)..... 7

Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed 2d 333 (1980)..... 5,7

TABLE OF AUTHORITIES - (continued)

Dounton v. Perini, 511 F.Supp. 258 (N.D. Ohio 1981)..... 9

Golden v. Zwickler, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969).....11

Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971).....8,9

Jones v. Barnes, ___U.S.___, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).....6,8

Lowery v. Cardwell, 575 F.2d 727 (9 Cir. 1978)..... 7

Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052, 80 L.Ed2d 674 (1984)..... 7

United States v. Bifield, 702 F.2d 342 (2Cir.), cert. den., 103 S.Ct. 2095 (1983)..... 8

United States v. Curtis, 742 F.2d 1070 (7Cir. 1984).....11

United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978)..... 9

United States ex. rel. Wilcox v. Johnson, 555 F.2d 1115 (3 Cir. 1977).....7,8

Whiteside v. Scurr, 744 F.2d 1323 (8 Cir. 1984).....7,8,9,10

CONSTITUTIONAL PROVISIONS:

Fifth Amendment, United States Constitution.....

Sixth Amendment, United States Constitution.....

Fourteenth Amendment, United States Constitution.....

OTHER AUTHORITIES:

ABA Model Rules of Professional Conduct, Rule 3.3 and Comment..... 6

No. 84-1321

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

RESISTANCE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Respondent Emmanuel Charles Whiteside respectfully prays that this court deny Petitioner's request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals granting Respondent a writ of habeas corpus.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> No person shall be...compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law. ...

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall... have the Assistance of Counsel for his defense.

Fourteenth Amendment, United States Constitution

> No State...shall...deprive any person of life, liberty, or property without due process of law.

STATEMENT OF FACTS

Testimony at Petitioner's trial established that Emmanuel Whiteside and two companions, Terry Fowler and Derrick Doolin, went to the apartment of the victim, Calvin Love, and his girlfriend, Kathy Sauer, to obtain some marijuana. (Trial Tr. pp. 75-76)[1]. While there, an argument ensued about the marijuana and Love, who was lying on a bed, stated at least once that Sauer should get his "piece". (Trial Tr. pp. 78, 96, 238, 272, 302). At one point, Love got up, went to a

---

[1] The trial transcript is being certified to the Court under separate cover.

different part of the room and then returned to the bed. (Trial Tr. p. 95). Then, Love made a move to get off his bed moving toward Whiteside. (Trial Tr. pp. 239, 272). A scuffle ensued and Love was fatally stabbed in the chest by Whiteside. (Trial Tr. pp. 272-274,303). Sauer then gave Whiteside the marijuana and the trio left. (Trial Tr. p. 81).

Testimony also showed that the room where the stabbing occurred was poorly lighted (Trial Tr. p. 237), that Love had a reputation for carrying weapons (Trial Tr. p. 326, 335), and that he was intoxicated the night he was killed. (Trial Tr. pp. 89-90, 160). It was also established that Sauer and Love's family broke the padlock off his apartment door and removed everything, including the carpet, the next morning. (Trial Tr. pp. 67, 102). Police officers had conducted a "cursory search" of the premises after Love had been removed by ambulance attendants. (Trial Tr. pp. 192-193).

A major point of controversy was whether Love reached under his pillow just prior to getting off the bed when he was stabbed. Kathy Sauer was not sure where Love's hands were. (Trial Tr. pp. 103-104). Fowler stated Love did not place them under the pillow while Whiteside and Doolin stated that he did put his hands under the pillow prior to getting up. (Trial Tr. pp. 241, 274, 302). Doolin, Fowler and Whiteside all testified that they thought Love had a gun but none stated that they saw

one. (Trial Tr. pp. 239, 274, 303-304).

At the hearing on Whiteside's Motion for a New Trial, Whiteside testified that when Attorney Robinson first visited him, he gave Robinson a written summary of the event that stated that he saw a gun in Love's hands. (A62-69)[2]. He stated that after no gun was found, Robinson told him he would withdraw if he claimed he actually saw a gun. (A70-72). He agreed to testify that he only thought Love had a gun based on the threat and that he felt, based on Robinson's assurances, it would all work out. (A74-75).

Gary Robinson testified that, after reading Whiteside's statement, Whiteside stated that he did not really see the gun and that Whiteside acquiesced in the strategy of trying to "create" a gun. (A77-79). He stated that, when it became clear that a gun could not be found, Whiteside insisted on testifying he saw a gun. (A84-87). Robinson said he told Whiteside he could not condone perjury, that if he testified he saw a gun he would withdraw, inform the court of the perjury and be available as a rebuttal witness. (A84-88). He stated that his threats caused Whiteside to testify as he did. (A89). Attorney Donna Paulsen testified to essentially the same things as Robinson.

---

[2]References marked as (A67-89) are to the Appendix contained in Petitioner's Petition for Writ of Certiorari.

The trial court, in overruling Defendant's Motion for New Trial, stated: "I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson." (Ruling on Supplemental Motion for New Trial).

Petitioner's recital of the procedural history of the case is adopted as essentially correct. (Pet. pp. 5-7).

REASONS FOR DENYING THE WRIT

I. THE INEFFECTIVE ASSISTANCE OF COUNSEL HOLDING OF THE FEDERAL COURT OF APPEALS IS CONSISTENT WITH THE HOLDINGS OF THE MAJORITY OF COURTS WHO HAVE ADDRESSED THE ISSUE.

Petitioner attacks the holding of the Court of Appeals below primarily on the ground that trial counsel's threat to withdraw from representation of respondent, disclose the alleged perjury to the trial judge and testify against him[3] was a perfectly constitutional and ethical response to his client's apparent desire to testify untruthfully. The paucity and quality

---

[3]Petitioner's attempt to characterize attorney Robinson's threat as one limited to impeachment by cross examination is simply not borne out in the context of the record. (Pet. p. 10). Further, Petitioner has never controverted the fact that this was a threat to testify in any prior proceedings. None of the dissenters in the Court of Appeals questioned this fact. (A26, 31). In any event, impeaching a client by disclosing confidential material on cross-examination is as egregious a violation of the right to counsel as testifying.

Further, the record clearly shows that the threat to testify was part and parcel of the series of threats which caused Petitioner to change his testimony. (A89).

Finally, whether Petitioner characterized his disagreement with trial counsel as a "conflict" is irrelevant. (Pet. p. 10). Sophisticated trial counsel is in a much better position to recognize a conflict of interest than a client. Cuyler v. Sullivan, 446 U.S. 335, 346-7, 100 S.Ct. 1708, 1717, (64 L.Ed.2d 333) 45-6 (1980).

of Petitioner's authority underscores the weakness of his position.

Petitioner's principal authority for the contention that the majority of jurisdictions would support trial counsel's actions is the ABA/BNA Lawyers' Manual on Professional Conduct, a document which is nothing more than a treatise, never formally adopted by the ABA. Reliance on this treatise is especially questionable when the ABA Model Rules of Professional Conduct and its commentary, adopted by the ABA, note that, even if counsel might believe that ethical standards require disclosure of the suspected perjury, the ethical standards are "subordinate" to the defendant's right to counsel. See ABA Model Standard Rule 3.3 and commentary at §§01:146-148. This is consistent with this Court's statement in Jones v. Barnes, ___U.S.___, 103 S.Ct. 3308, 3314, 77 L.Ed.2d 987, 995, N. 7(b), (1983), that, "..., the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution."

Further, the treatise's contention that the majority of jurisdictions approve disclosure of the planned client perjury is simply wrong as applied to criminal cases. In almost all cases where the issue of client perjury has arisen, the courts have stated that, whatever remedy is taken, the right to counsel is violated when contents of confidential attorney-client

conversations are disclosed. Whiteside v. Scurr, 744 F.2d 1323, 1329 (8 Cir. 1984); Butler v. United States, 414 A.2d 844, 852, 854 (D.C. Cir. 1980); Lowery v. Cardwell, 575 F.2d 727, 730 (9 Cir. 1978); United States ex. rel. Wilcox v. Johnson, 555 F.2d 1115, 1122 (3 Cir. 1977)

Thus, the great weight of authority supports the Court of Appeals' conclusion that trial counsel's actions violated respondent's right to the effective assistance of counsel.

Next, Petitioner claims that the Court of Appeals erred in applying the limited presumption of prejudice for conflict of interest cases to the situation here. However, as the Court of Appeals stated, trial counsel was no longer just representing Whiteside's interests when it became clear what Whiteside was going to testify to. Counsel was also representing his own interests in protecting himself from claims of ethical violations or suborning perjury. Moreover, being a witness against one's client is the height of conflict of interest. Whiteside, 744 F.2d at 1329. See Lowery v. Cardwell, 575 F.2d 727, 732 (9 Cir. 1978), (concurring opinion); Commonwealth v. Wolfe, 447 A.2d 305, 310-11 (Pa. Sup. 1982). Trial counsel was shown to be "actively representing conflicting interests," which "adversely affected his...performance." Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674, 696 (1984), (citing Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708,

64 L.Ed.2d 333 (1980). The limited presumption of prejudice was correctly applied.

II. RESPONDENT'S RIGHT TO TESTIFY WAS VIOLATED BY TRIAL COUNSEL'S CONDITIONING FURTHER REPRESENTATION AND CONFIDENTIALITY ON THE CONTENT OF THAT TESTIMONY.

Petitioner attacks the Court of Appeals' "alternate" holdings by challenging the premise that a criminal defendant has a constitutional right to testify. (Pet. p. 14). However, as the Court of Appeals' decision states, the right to testify is recognized in the majority of courts of appeals that have faced the question. Whiteside, 744 F.2d at 1329-30; United States v. Bifield, 702 F.2d. 342, 349 (2 Cir.), cert. den., 103 S.Ct. 2095 (1983); Alicea v. Gagnon, 675 F.2d. 913, 923 (7 Cir. 1982); Wilcox, 555 F.2d at 118-19. Even the dissenters below did not challenge this basic premise. See dissent of Fagg, J., (A32 of Pet.). Moreover, this Court appeared to recognize a constitutional right to testify in Harris v. New York, 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1, 4 (1971) and by its statement in Jones v. Barnes, ___U.S.___, 103 S.Ct. 3308, 3312, 77 L.Ed.2d. 987, 993 (1983), where the decision to testify was recognized as one to be made personally by the defendant. Clearly, the existence of a right to testify on one's own behalf is no longer subject to serious dispute.

Next, Petitioner avers, in essence, that the right to

testify does not protect a criminal defendant from all consequences which may flow from his or her testimony. (Pet. pp. 15-16). The Court of Appeals' opinion does not dispute this. Clearly, a defendant may be punished with a perjury charge or enhanced punishment if he or she lies while testifying. United States v. Grayson, 438 U.S. 41, 53-4, 98 S.Ct. 2610, 2617, 57 L.Ed.2d 582, 592 (1978). Further, a testifying defendant may be impeached by prior inconsistent statements made to police. Harris, 401 U.S. at 225-6, 91 S.Ct. at 645-6, 28 L.E.2d at 4-5. However, nothing in these cases suggests that a client determined to commit perjury waives his or her right to the assistance of counsel. Whiteside, 744 F.2d at 1328; Order denying motion for rehearing en banc. (A22 and A25 of Pet.)

Finally, Petitioner claims that the Court of Appeals' decision disarms counsel from dissuading a defendant from the consequences of his or her decision to testify. (Pet. pp. 15-16). This confuses the distinction between those decisions counsel makes as a matter of strategy and those which are up to the client to make. Counsel may not condition continued representation on the defendant's choice in these matters. See Dounton v. Perini, 511 F.Supp. 258, 267-8 (N.D. Ohio 1981). The unconstitutional coercion resulting from trial

counsel's threat was especially effective here because Petitioner had been earlier warned that his "chances of getting another change of attorneys are about zero(?)." (A53)

Thus, it is clear that Petitioner was put to an unconscionable choice between his right to testify and the right to assistance of counsel. The Court of Appeals' "alternate" holding supports denial of the writ.

III. THE LIMITED HOLDING OF THE COURT OF APPEALS MAKES IT UNNECESSARY TO FURTHER EXPLORE THE QUESTIONS RAISED BY PETITIONER.

Petitioner urges this court to grant the writ of certiorari by stating that the Court of Appeals' decision leaves unanswered the question of what a criminal defense attorney must do when confronted with a client who insists on committing perjury. However admirable Petitioner's desires are in this regard, the questions he wants answered are beyond the scope of this case.

The Court of Appeals' opinion makes clear that its holding is limited to the facts of the issue presented. That is, trial counsel deprived Respondent of his right to counsel and due process when he threatened to disclose his client's perjury and testify against him. Whatever might be argued as to what counsel must do when faced with this situation, it is clear that counsel cannot become or threaten to become the client's adversary. Whiteside, 744 F.2d at 1329; concurrence of

Lay, C.J., in Order denying rehearing en banc. (A24-A26). Further, no reading of the ethical rules of conduct, as applied to criminal cases, required that trial counsel take the steps he did.

Thus, this case does not present the type of situation where an authoritative pronouncement by this Court on the issue at hand is necessary or desirable. Any expostulation of what an attorney may or must do when confronted with client perjury would be merely "advisory" as to this case.[4] See Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 959, 22 L.Ed.2d 113, 117 (1969).

CONCLUSION

For all of the above reasons, it is respectfully submitted that the petition for a writ of certiorari in the above-captioned matter should be denied.

Respectfully submitted,

Patrick R. Grady
Assistant Public Defender
214 First St. S.W.
Cedar Rapids, Iowa 52404
Phone: (319) 398-3690

[4] A case such as United States v. Curtis, 742 F.2d 1070, 1076 (7 Cir. 1984), where counsel completely prevented a perjury determined defendant from testifying presents a more appropriate fact situation for resolving those questions.

CERTIFICATE OF SERVICE

I, Patrick R. Grady, a member in good standing of the bar of the Supreme Court of the United States, do hereby certify that on March 15, 1985, I caused a copy of Respondent's Resistance to Petition for a Writ of Certiorari in the case of Nix v. Whiteside, No. 84-1321, to be sent by first class mail, postage prepaid to: Mr. Brent R. Appel, Deputy Attorney General of Iowa, Hoover State Office Building, Second Floor, Des Moines, Iowa 50319.

Patrick R. Grady

AFFIDAVIT OF SERVICE

STATE OF IOWA)
) ss:
COUNTY OF LINN)

I, Patrick R. Grady, a member in good standing of the bar of the Supreme Court of the United States, do hereby depose that on March 15, 1985, I caused an original and three copies of Respondent's Resistance to Petition for a Writ of Certiorari in the case of Nix v. Whiteside, No. 84-1321 to be sent by first class mail, postage prepaid to: Clerk United States Supreme Court, Washington, D.C. 20543.

Patrick R. Grady
214 First St. S.W.
Cedar Rapids, Iowa 52404
Phone: (319) 398-3690

Subscribed and sworn to before me by the said Patrick R. Grady on this 15 day of March, 1985.

Notary Public, State of Iowa

Office-Supreme Court, U.S.
FILED
MAR 27 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1321

In The

Supreme Court of the United States

October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

REPLY TO RESPONDENT'S RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5166

THOMAS D. McGRANE
Assistant Attorney General

March 26, 1985

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

TABLE OF CONTENTS

Page

ARGUMENT:

I. THE PANEL OPINION ON ITS FACE IS NOT LIMITED TO "THREAT TO TESTIFY" CASES. 1

II. CONTRARY TO THE RESPONDENT'S VIEW, COURTS HAVE NOT "IN ALMOST ALL CASES" ENDORSED A BROAD RULE THAT A CRIMINAL DEFENSE ATTORNEY MAY NOT DISCLOSE A CLIENT'S PERJURY PLAN TO THE COURT. 2

III. THE POSSIBILITY OF PROSECUTION FOR PERJURY OR ENHANCED PUNISHMENT DOES NOT ADEQUATELY VINDICATE THE STATE'S INTEREST IN PROTECTING THE INTEGRITY OF THE FACT FINDING PROCESS IN CRIMINAL TRIALS. 3

CONCLUSION 4

CITATIONS

CASES:

People v. Lewis, 75 Ill.App. 560, 393 N.E.2d 1380 (1979) 3

State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970) 3

United States, ex rel. Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977) 3

Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984) 1, 2

OTHER AUTHORITIES:

"Recent Federal Cases," 360 N.W.2d No. 3 (Feb. 19, 1985) 2

No. 84-1321

In The

Supreme Court of the United States

October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

REPLY TO RESPONDENT'S RESISTANCE TO PETITION FOR A WRIT OF CERTIORARI

I. THE PANEL OPINION ON ITS FACE IS NOT LIMITED TO "THREAT TO TESTIFY" CASES.

Notwithstanding observations in Chief Judge Lay's solo concurring opinion denying rehearing en banc, the opinion of the panel, especially the right to testify holding, does not narrowly rest on any alleged "threat" by Whiteside's attorney to testify against him. *Whiteside v. Scurr,* 744 F.2d 1323, 1329 (8th Cir. 1984). It is thus not surprising that currently circulating advance sheets de-

scribe the panel opinion in *Whiteside* as holding that a "lawyer may not disclose that client is about to commit perjury." *See* "Recent Federal Cases," 360 N.W.2d No. 3 (Feb. 19, 1985) at XL.

The Respondent himself does not disagree with the broad characterization of the case in the advance sheets. *See* Resistance at 8. Moreover, the Respondent does not see the "threat to testify," as critical or essential to the outcome of the case.[1] Resistance at 5 n.3.

II. CONTRARY TO THE RESPONDENT'S VIEW, COURTS HAVE NOT "IN ALMOST ALL CASES" ENDORSED A BROAD RULE THAT A CRIMINAL DEFENSE ATTORNEY MAY NOT DISCLOSE A CLIENT'S PERJURY PLAN TO THE COURT.

The Respondent declares that statements in the ABA/BNA Manual on Professional Conduct that the majority of jurisdictions approve disclosure of planned client perjury cases is simply wrong as applied to criminal cases. He further contends that "in almost all cases" where the client perjury issue has arisen, the courts have stated that the right to counsel is violated when the contents of confidential attorney-client conversations are disclosed. Resistance at 6-7.

---

[1]Of course, Petitioner still challenges the de novo appellate finding that Whiteside's attorney actually threatened to testify against him. While the Petitioner did not discuss the issue in briefing before the Court of Appeals, there has been no waiver for failure to attack a characterization of facts that was not accepted by any state post conviction court or by the federal district court and was embraced for the first time in the Court of Appeals.

The Respondent misreads a key case and ignores important decisions cited by the treatise. For instance, in *United States, ex rel. Wilcox v. Johnson,* 555 F.2d 115 (3rd Cir. 1977), a case cited by Respondent in his attack on the ABA/BNA Manual, the Court simply stated that if an attorney told the trial judge that his client planned to commit perjury *"without possessing a firm factual basis for that belief,"* he would be violating the duty imposed upon him as defense counsel (emphasis added). 555 F.2d at 122. In this case, however, Whiteside told his attorney flat out that he intended to commit perjury on the stand. "If I don't say I saw a gun," Whiteside told his lawyer, "I'm dead." (A. 85)

The Respondent also ignores *People v. Lewis,* 75 Ill. App. 560, 393 N.E.2d 1380, 1384 (1979) and *State v. Henderson,* 205 Kan. 231, 468 P.2d 136, 140-1 (1970), cases accurately cited by the ABA/BNA treatise to support its view that in a majority of jurisdictions, disclosure of client perjury to the court is a reasonable remedial measure in criminal cases.

III. THE POSSIBILITY OF PROSECUTION FOR PERJURY OR ENHANCED PUNISHMENT DOES NOT ADEQUATELY VINDICATE THE STATE'S INTEREST IN PROTECTING THE INTEGRITY OF THE FACT FINDING PROCESS IN CRIMINAL TRIALS.

The Respondent implies that the State has adequate sanctions to protect the courts from client perjury, noting that a criminal defendant may be prosecuted for perjury or receive enhanced punishment as a result of perjured testimony. Resistance at 9. These sanctions, however, cannot be expected to deter perjury in murder cases where the defendant faces a possibility of lifetime imprisonment as in this case or, in many states, capital punishment.

CONCLUSION

For all the above reasons, and for the reasons stated in our Petition, the Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals in this case.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5166

THOMAS D. MCGRANE
Assistant Attorney General

*Counsel of Record

No. 84-1321 (2)

Office - Supreme Court, U.S.
FILED
MAR 4 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1984

CRISPUS NIX, WARDEN,

Petitioner,

vs.

EMMANUAL CHARLES WHITESIDE,

Respondent.

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE FLORIDA, HAWAII, IDAHO, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING.

LINLEY E. PEARSON
Attorney General of Indiana

WILLIAM E. DAILY
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6217

Central Publishing Company, Inc., Indianapolis, IN 46206

Honorable Charles A. Graddick
Attorney General of Alabama
Post Office Box 948
Montgomery, Alabama 36102

Honorable Robert K. Corbin
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007

Honorable Duane Woodard
Attorney General of Colorado
1525 Sherman Street—Third Floor
Denver, Colorado 80203

Austin J. McGuigan, Chief State's Attorney
John M. Massameno, Assistant State's Attorney
Connecticut Division of Criminal Justice
340 Quinnipiac Street
P.O. Box 5000
Wallingford, Connecticut 06492

Honorable Charles M. Oberly
Attorney General of Delaware
820 North French Street, 8th Floor
Willmington, Delaware 19801

Honorable Jim Smith
Attorney General of Florida
State Capitol
Tallahassee, Florida 32301

Honorable Michael A. Lilly
Attorney General of Hawaii
State Capitol
Honolulu, Hawaii 96813

Honorable Jim Jones
Attorney General of Idaho
State House
Boise, Idaho 83720

Honorable Neil F. Hartigan
Attorney General of Illinois
160 North LaSalle Street, Room 900
Chicago, Illinois 60601

Honorable Robert T. Stephan
Attorney General of Kansas
Judicial Center—Second Floor
Topeka, Kansas 66612

Honorable David L. Armstrong
Attorney General of Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601

Honorable William J. Guste, Jr.
Attorney General of Louisiana
2-3-4 Loyola Building
New Orleans, Louisiana 70112

Honorable Stephen H. Sachs
Attorney General of Maryland
Seven North Calvert Street
Baltimore, Maryland 21202

Honorable Frank J. Kelley
Attorney General of Michigan
Law Building
Lansing, Michigan 48913

Honorable Hubert H. Humphrey, III
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155

Honorable Edwin L. Pittman
Attorney General of Mississippi
P.O. Box 220
Jackson, Mississippi 39205

Honorable William L. Webster
Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102

Honorable Mike Greely
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620

Honorable Robert M. Spire
Attorney General-Designate of Nebraska
State Capitol
Lincoln, Nebraska 68509

Honorable Brian McKay
Attorney General of Nevada
Heroes Memorial Building, Capitol Comlex
Carson City, Nevada 89710

Honorable Stephen E. Merrill
Attorney General of New Hampshire
208 State House Annex
Concord, New Hampshire 03301

Honorable Paul Bardacke
Attorney General of New Mexico
Bataan Building, P.O. Box 1508
Santa Fe, New Mexico 87504-1508

Honorable Lacy H. Thornburg
Attorney General of North Carolina
Department of Justice, P.O. Box 629
Raleigh, North Carolina 27602

Honorable Anthony Celebrezze
Attorney General of Ohio
State Office Tower, 30 E. Broad St.
Columbus, Ohio 43215

Honorable LeRoy S. Zimmerman
Attorney General of Pennsylvania
Strawberry Square—16th Floor
Harrisburg, Pennsylvania 17120

Honorable Arlene Violet
Attorney General of Rhode Island
72 Pine Street
Pr vidence, Rhode Island 02903

Honorable Travis Medlock
Attorney General of South Carolina
Rembert Dennis Office Building
Columbia, South Carolina 29211

Honorable Mark V. Meierhenry
Attorney General of South Dakota
State Capitol Building
Pierre, South Dakota 57501

Honorable W.J. Michael Cody
Attorney General of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219

Honorable Jim Mattox
Attorney General of Texas
Capitol Station, P.O. Box 12548
Austin, Texas 78711

Honorable David L. Wilkinson
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

Honorable Jeffrey Amestoy
Attorney General of Vermont
Pavilion Office Building
Montpelier, Vermont 05602

Honorable Gerald L. Baliles
Attorney General of Virginia
101 N. 8th Street—5th Floor
Richmond, Virginia 23219

Honorable Kenneth O. Eikenberry
Attorney General of Washington
Temple of Justice
Olympia, Washington 98504

Honorable Charlie Brown
Attorney General of West Virginia
State Capitol
Charlestown, West Virginia 25305

Honorable Archie G. McClintock
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

TABLE OF CONTENTS

Page:

Table of Authorities ii

Interest of the Amici Curiae 1

Statement of the Case 2

Reasons for Granting the Writ 3

I. IF ALLOWED TO STAND, THE HOLDING OF THE COURT OF APPEALS WILL ESTABLISH A BASIS FOR A HABEAS CORPUS ATTACK FOR ANY PERSON WHO ALLEGES THAT HE OR SHE WAS DISSUADED FROM TESTIFYING FALSELY BY AN ATTORNEY WHO THREATENED TO WITHDRAW AND ADVISE THE COURT OF THE REASON IF HIS CLIENT INSISTED ON LYING TO THE COURT 3

II. THE HOLDING OF THE COURT OF APPEALS WILL DISCOURAGE THE DEVELOPMENT OF LEGAL ETHICS IN THE CONTEXT OF A DIVERSE FEDERAL SYSTEM 5

III. A FEDERAL COURT SHOULD NOT GRANT A WRIT OF HABEAS CORPUS WITHOUT A SHOWING OF PREJUDICE TO THE DEFENDANT WHERE AN ATTORNEY SUCCESSFULLY PERSUADES A CLIENT NOT TO TESTIFY FALSELY 7

Conclusion 8

TABLE OF AUTHORITIES

Cases:	*Pages:*
Committee on Professional Ethics and Conduct v. Crary, 245 N.W.2d 298 (1976)	5
New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932)	6
State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978)	2
Strickland v. Washington, U.S., 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	7
United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984)	7
Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984)	2, 3, 4, 5
Whiteside v. Scurr, No. 83-1015, Slip Op.	4, 8

No. 84-1321

IN THE

Supreme Court of the United States

October Term, 1984

CRISPUS NIX, WARDEN,

Petitioner,

vs.

EMMANUAL CHARLES WHITESIDE,

Respondent.

BRIEF OF AMICI CURIAE ON BEHALF OF PETITIONER CRISPUS NIX ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTEREST OF THE AMICI CURIAE

The State of Indiana, and the 36 other amici states and commonwealths, through their respective Attorneys General, and the State of Connecticut, by its Chief State's Attorney, offer this brief as amici curiae in support of the petition for a writ of certiorari sought by Crispus Nix, warden of the Iowa State Penitentiary in the above-captioned matter. The amici states all administer criminal justice systems within their jurisdiction which seek to

promote the safety and welfare of their citizens. In the view of the amici states, the decision of the Court of Appeals in the present case, if allowed to stand, will cause substantial and unnecessary confusion among the bench and bar as to the proper conduct of a criminal defense attorney when faced with a client who advises his lawyer that he intends to commit perjury on the stand. Because of the importance of clarifying the role of defense counsel for the administration of criminal justice in their respective jurisdictions, the amici respectfully pray that the petition for certiorari be granted.

STATEMENT OF THE CASE

In this case, the Court of Appeals set aside Emmanual Charles Whiteside's state court conviction on the ground that his attorney violated Whiteside's right to effective assistance of counsel, to due process of law, and to testify on his own behalf, when the attorney successfully convinced his client not to commit perjury on the witness stand. *Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1984).

The background facts may be briefly stated. Whiteside was charged with the stabbing murder of Calvin Love in connection with a drug transaction that occurred in Whiteside's apartment. The defense theory was that the homicide was committed in self defense. Originally, Whiteside had told his attorney that he had not seen a gun on the person of the deceased, but before trial, he advised his lawyer that he was going to testify that he saw something "metallic" in the hands of Love shortly before Whiteside stabbed him. *See Whiteside, supra* at 1326.

In addition to Whiteside's previous statements to counsel, all the other evidence belied defendant's tardy claim. Three other persons were in the room at the time of the homicide, and none reported seeing a gun. A search of the apartment shortly after Love's death did not disclose a weapon. *See State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978).

Convinced that his client was preparing to commit perjury, Whiteside's attorney admonished him that if he persisted, the attorney would advise the court and "probably would be allowed to attempt to impeach that particular testimony." *See* Appendix, *Whiteside v. Scurr*, *supra* at 47.

While the Eighth Circuit accepted the state court's factual finding that Whiteside was proposing to testify falsely, 744 F.2d at 1328, the panel nevertheless held that Whiteside's attorney had impermissibly deprived him of effective assistance of counsel, due process, and the right to testify. The State sought rehearing en banc. By a 5-4 margin, the Eighth Circuit denied en banc consideration. *Whiteside v. Scurr*, No. 83-1015 (order denying rehearing en banc) (8th Cir., Dec. 24, 1984).

The amici states now join the effort of petitioner Crispus Nix, warden of the Iowa State Penitentiary, to obtain a writ of certiorari to review the opinion and judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. IF ALLOWED TO STAND, THE HOLDING OF THE COURT OF APPEALS WILL ESTABLISH A BASIS FOR A HABEAS CORPUS ATTACK FOR ANY PERSON WHO ALLEGES THAT HE OR SHE WAS DISSUADED FROM TESTIFYING FALSELY BY AN ATTORNEY WHO THREATENED TO WITHDRAW AND ADVISE THE COURT OF THE REASON IF HIS CLIENT INSISTED ON LYING TO THE COURT.

In brief separate opinions accompanying the order of the Court of Appeals denying rehearing en banc, two judges attempted to characterize the original panel opinion as limited in scope. For instance, Judge McMillian states that the panel held "only that a lawyer who has a firm factual basis for believing that his or her client is about to commit

perjury because of confidential communications the client made to the lawyer may not disclose the content of those confidential communications to the trier of fact, in the present case the jury." *Whiteside v. Scurr*, No. 83-1015 (order denying rehearing en banc) (8th Cir. Dec. 24, 1984). Slip Op. at 1. *See also* opinion of Judge Lay concurring in denial of rehearing en banc, *id.*, at 10.

The panel opinion, however, is not so easily limited. For instance, the panel states that Whiteside's lawyer "impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation and confidentiality upon appellant's restricted testimony." *Whiteside v. Scurr*, 744 F.2d at 1329. Under this holding of the panel, a lawyer commits constitutional error cognizable in a habeas corpus proceeding if he or she complies with the ABA Model Rule of Professional Conduct 3.3 (1983), which provides:

> (a) a lawyer shall not knowingly:
> fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

A rule of law that declares that an attorney who complies with ABA Model Rule of Professional Conduct 3.3 in a criminal case commits constitutional error will have serious consequences for the administration of the criminal justice system. The public cannot be expected to place confidence in a judicial system which grants a new trial on the grounds that an attorney, by threatening to comply with state law and the code of ethics, persuaded his client to testify truthfully.

II. THE HOLDING OF THE COURT OF APPEALS WILL DISCOURAGE THE DEVELOPMENT OF LEGAL ETHICS IN THE CONTEXT OF A DIVERSE FEDERAL SYSTEM.

As recognized by the panel opinion, the proper role of an attorney when confronted with a client who is determined to commit perjury is "very controversial." 744 F.2d at 1327. At the far end of the spectrum, Monroe Freedman emphasizes the role of attorney as advocate, even though it includes presenting the Court with false evidence. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966). Other commentators, however, have placed more emphasis on the role of the attorney as an officer of the court. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich. L. Rev. 1485 (1966).

The states have taken differing approaches to the question. In Florida, for instance, the applicable Rule of Professional Responsibility states that the attorney *shall* reveal the intention of his client to commit a crime (perjury) to the court. *See also* ABA Model Rule of Professional Responsibility, DR 4-101(D) (1969). Florida Stat. Ann. Code of Professional Responsibility, D-R 4-101(D)(1) (1980). In Iowa, the State Supreme Court has held that a client who perjures himself acts outside the attorney client privilege and that an attorney may not knowingly allow his or her client to lie to a tribunal. *Committee on Professional Ethics and Conduct v. Crary*, 245 N.W.2d 298 (1976).

Other states, however, appear to have adopted policies more consistent with Professor Freedman. In Alabama, a lawyer is to withdraw from employment if his client insists on committing perjury, but the attorney is not directed to advise the court. In North Carolina, a lawyer is to withdraw "without necessarily revealing his reasons for wishing to withdraw." Alabama Code of Professional Responsibility, DR 7-102(B)(1); North Carolina Code of Professional

Responsibility, DR 7-102(B)(1). In the District of Columbia, the attorney is simply directed to "call upon his client to rectify" the perjury. District of Columbia Code of Professional Responsibility, DR 7-102(B)(1). *See also* ABA Project on Standards for Criminal Justice: The Prosecution and the Defense Function, Proposed Defense Function Standard 4-7.7 (2d ed. 1980) (lawyer may withdraw, but court should not be advised of reason for seeking to do so).

The effect of the holding of the opinion of the Court of Appeals, however, is to sharply limit the range of Rules of Professional Responsibility that the states may adopt. It seems clear that under the Court of Appeal's approach, Florida's rule is constitutionally suspect. In addition, the rules of many states which permissibly allow attorneys to advise a court of perjury of their clients will be subject to serious constitutional challenge if the holding of the Court of Appeals is not reviewed by this Court. *See e.g.*, Connecticut Code of Professional Responsibility, DR 4-101(C)(3); Idaho Code of Professional Responsibility, DR 4-101(C)(3); Louisiana Code of Professional Responsibility, DR 4-101(C)(3); Pennsylvania Code of Professional Responsibility DR 4-101(c)(3); Montana Code of Professional Responsibility DR 4-101(c)(3).

It is respectfully submitted that states in the federal system should not be constrained by the constitutionalization of legal ethics that is embraced in the opinion of the Court of Appeals. It is precisely in areas of controversy and uncertainty that diversity within the federal system should be allowed to flourish. To stay experimentation by the states, as Justice Brandeis noted many years ago, is a "grave responsibility." *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932). *See also* Frankfurter, *The Public and Its Government*, 49-51 (1930). Because the opinion of the Court of Appeals will significantly discourage the experimental process within the federal system, this Court should grant the petition for a writ of certiorari.

III. A FEDERAL COURT SHOULD NOT GRANT A WRIT OF HABEAS CORPUS WITHOUT A SHOWING OF PREJUDICE TO THE DEFENDANT WHERE AN ATTORNEY SUCCESSFULLY PERSUADES A CLIENT NOT TO TESTIFY FALSELY.

The panel opinion in this case presumes that Whiteside was prejudiced when his attorney persuaded him that he should testify truthfully at trial. The Court defends this extraordinary proposition with a citation to *Strickland v. Washington*, U.S., 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), noting that prejudice is presumed where an attorney "actively represented conflicting interests" and that the actual conflict of interest "adversely affected his lawyer's performance." 744 F.2d at 1330.

At the threshold, there is a substantial question whether the limited presumption described in *Strickland* is applicable at all. In order for a conflict of interest to be present in this case, both the attorney and his client must have legally recognized rights that are mutually inconsistent. Since Whiteside does not have a constitutionally protected right to take the stand and commit perjury, he simply does not have a legally cognizable interest sufficient to trigger the limited presumption of prejudice outlined in *Strickland* for some claims of ineffective assistance of counsel. *See United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984) (no ineffective assistance where lawyer refuses to allow client to take witness stand and commit perjury).

Even if the *Strickland* rule is applicable, there still must be some showing that the actual conflict of interest "adversely affected his lawyer's performance" before the presumption of prejudice is triggered. In this case, however, there is no showing that the alleged conflict adversely affected his lawyer's performance at trial.

Indeed, Whiteside appears to have had the benefit of zealous advocacy. *See* Fagg, J., dissenting from denial of rehearing en banc in *Whiteside, supra*, Slip. Op. at 7.

It is difficult to see how Whiteside would have helped himself if he had taken the stand and committed perjury. Eyewitnesses to the crime did not see a gun, and a police search of the premises did not reveal a weapon. His claim to have seen a gun was not believed by any of the courts who have reviewed the facts of this case, and his perjured testimony simply would not have been believed by the jury.

In the view of the amici, a retrial of a defendant where an attorney's admonitions in a previous trial had no adverse consequence except to prevent the client from committing perjury would be awkward at best and finds no support in the legal precedents of this Court.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

WILLIAM E. DAILY
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6217

Office - Supreme Court, U.S.
FILED
MAR 15 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

V.

EMMANUEL CHARLES WHITESIDE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, SUPPORTING PETITION FOR WRIT OF CERTIORARI

JEAN FLEMING POWERS
Assistant Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

DAVID CRUMP
Professor of Law
South Texas College of Law

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

BRIEF OF AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 2

I. THERE IS A CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND THE DECISION OF ANOTHER COURT OF APPEALS, AND BETWEEN THE DECISION OF THE COURT OF APPEALS AND THE DECISION OF A STATE COURT OF LAST RESORT, REGARDING FEDERAL CONSTITUTIONAL REQUIREMENTS GOVERNING ATTORNEYS IN CASES INVOLVING CONTEMPLATED CLIENT PERJURY 2

II. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT. FURTHER, THE COURT OF APPEALS MISAPPLIED PRIOR DECISIONS OF THIS COURT 3

A. *The Decision of the Eighth Circuit Unnecessarily Interferes With Rights of States to Determine Ethical Standards for Attorneys Practicing in their Courts. It Would Prevent the Enforcement of the ABA Model Rules of Professional Conduct* 3

B. *The Decision of the Lower Court Opens the Door to a Claim of Conflict of Interest in*

any Case in Which an Attorney Must Make Difficult Ethical Decisions 6

C. *The Lower Court's Decision is Potentially More Detrimental to Effective Assistance of Counsel than the Action Taken by the Defendant's Attorney* 8

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Cuyler v. Sullivan, 446 U.S. 335 (1980) 6, 7
Harris v. New York, 401 U.S. 222 (1971) 4
State v. Whiteside, 272 N.W.2d 468 (Iowa 1978) 3
Strickland v. Washington, 104 S.Ct. 2052 (1984) 6
United States v. Cronic, 104 S.Ct. 2039 (1984) 6
United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984) 2
Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984) 2, 5
Whiteside v. Scurr, 750 F.2d 713 (8th Cir. 1984) (order denying motion for rehearing en banc) 3

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. VI 6

OTHER AUTHORITIES

ABA Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function, Proposed Defense Function Standard 4-7.7(c) (2d ed. 1980) 7
Kutak, *A Commitment to Clients and the Law*, 68 A.B.A.J. 804 (1982) 5
MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) 3, 4
MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983) 4

NO. 84-1321

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

V.

EMMANUEL CHARLES WHITESIDE,
Respondent.

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm (as that term is defined in Internal Revenue regulations). Its goals include the preservation of a rational system of criminal justice. In pursuit of this goal, LFA has appeared as amicus curiae in this honorable Supreme Court, in the Courts of Appeals, in District Courts, and in the courts of the various states. LFA is located upon the campus of the South Texas College of Law in Houston, Texas. It shares activities and personnel with the law school. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

LFA considers that the decision below is not only inconsistent with the rational function of the criminal justice system, but also detrimental to the efforts of attorneys to defend their clients. The decision would thus do actual harm to the very persons it seeks to protect—namely, persons accused of crime and in need of effective counsel.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case made by Petitioner, Crispus Nix, Warden of the Iowa State Penitentiary.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT BETWEEN THE DECISION OF THE COURT OF APPEALS AND THE DECISION OF ANOTHER COURT OF APPEALS, AND BETWEEN THE DECISION OF THE COURT OF APPEALS AND THE DECISION OF A STATE COURT OF LAST RESORT, REGARDING FEDERAL CONSTITUTIONAL REQUIREMENTS GOVERNING ATTORNEYS IN CASES INVOLVING CONTEMPLATED CLIENT PERJURY.

The Seventh Circuit's decision in *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984), is in conflict with the decision in the case at bar. In *Curtis*, the court found no constitutional violation in the action of the defense attorney in refusing altogether to put the defendant on the witness stand because of indications that the defendant intended to commit perjury. The court stated that since it seemed "apparent that Curtis would have testified perjuriously, counsel's refusal to put him on the witness stand cannot be said to have violated Curtis' constitutional rights." [1]

In the case at bar, the Eighth Circuit held that constitutional rights of the defendant were violated even though he testified fully, on the basis that his testimony was "restricted" by his attorney to truthful testimony. [2]

---

1 742 F.2d at 1076.

2 Whiteside v. Scurr, 744 F.2d 1323, 1329 (8th Cir. 1984). The dissent in the denial of the motion for rehearing points out the incon-

The decision of the court of appeals further conflicts with the decision of the Iowa Supreme Court, which not only found no constitutional violation in the action of the attorney, but also commended him for the "high ethical manner" in which he acted. [3]

II. THIS CASE PRESENTS SUBSTANTIAL QUESTIONS OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT. FURTHER, THE COURT OF APPEALS MISAPPLIED PRIOR DECISIONS OF THIS COURT.

A. *The decision of the Eighth Circuit unnecessarily interferes with rights of states to determine ethical standards for attorneys practicing in their courts. It would prevent the enforcement of the ABA Model Rules of Professional Conduct.*

The decision below is in conflict with the Model Rules of Professional Conduct, even though the opinion includes those

---

gruity of the holding by quoting the following excerpts from the opinion:

> [W]e presume that appellant would have testified falsely.
>
> * * * *
>
> * * * Counsel threatened appellant that he would withdraw from the case, advise the state court trial judge of appellant's intention, and testify against him as rebuttal witness for the prosecution. Counsel's actions prevented appellant from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel.
>
> * * * *
>
> Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony.

Whiteside v. Scurr, 750 F.2d 713, 714-15 (8th Cir. 1984), citing 744 F.2d at 1328, 1329.

3 State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978).

Rules as an appendix. The Rules and Commentary expressly require an attorney to "persuade the client to refrain from perjurious testimony." [4] Given the present decision, it would be impractical for a lawyer to "persuade" the client against perjury, since he would be likely to make himself ineffective, and violate the Constitution, by that action.

The Model Rules and Commentary further provide that a lawyer "shall not knowingly offer evidence" that is false and "may refuse to offer evidence that the lawyer reasonably believes is false," [5] exactly as the lawyer did in this case. These Rules would be extraordinarily difficult for real-world counsel to implement consistently with the decision below. The Rules and Commentary also recognize the need for the lawyer to "exercise control over the proof." [6] They follow the decisions of this honorable Supreme Court in stating that "an accused should not have a right to assistance of counsel in committing perjury." [7] The attorney in this case took very modest measures to address these concerns, and for those measures he has been labelled constitutionally "ineffective."

The Model Rules are the official draft of the American Bar Association expressing professional standards for attorneys. They are intended for adoption by States in the regulation of the legal profession. The present decision would make their adoption difficult for many States.

The Model Rules are further the product of lengthy and occasionally heated debate within the ABA concerning the ap-

---

4 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

5 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4), (c) (1983).

6 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

7 Id. See Harris v. New York, 401 U.S. 222, 225 (1971).

propriate middle ground between two polarized viewpoints.[8] The late Robert Kutak, Chair of the ABA Committee on Professional Standards, wrote as follows in explaining and supporting the Model Rules:

> [W]e must reject any notion that the professional role should parallel the policeman's. We also must reject any notion that the professional role must, at times, be that of coconspirator. Between those two poles lies the proper role of the lawyer who must provide zealous representation of clients but remain within the bounds of law. [9]

The present decision presents substantial questions because it will frustrate efforts to achieve that middle ground so diligently sought by the American Bar Association. It would mean that every state adopting the ABA's Model Rules could not enforce provisions that are essential to the balance.

The Eighth Circuit purported to defer to the authority of the state supreme court "on all questions of state law."[10] But the decision leaves the states with few options in determining ethical standards for attorneys in the area of client perjury. It is the states that have responsibility for enforcing the criminal law against perjury committed in their courts, as well as regulating the legal profession—a responsibility they have had since before the founding of the Republic. This issue is not one that lends itself to clear, black-and-white resolution, but rather involves policy decisions, and the present decision prevents the States from making those policy decisions.

---

8 The Court below cites a few of the numerous articles written on this topic even before the discussion draft of the Model Rules was released.

9 Kutak, A Commitment to Clients and the Law, 68 A.B.A.J. 804, 805 (1982).

10 744 F.2d at 1330.

This Court has recently pointed out that "of course, the Sixth Amendment does not require that counsel do what is impossible or unethical." *United States v. Cronic*, 104 S.Ct. 2039, 2045 n. 19 (1984). In drafting the Sixth Amendment, the framers of the Constitution could not have intended to give rights to defendants that require unethical behavior by counsel. At a time when public confidence in both the ethical standards of attorneys and the ability of the criminal justice system to deal effectively with crime is especially low, the States must not be put into a situation in which they must choose, as apparently they must in this case, between legal and ethical conduct of the attorneys who are officers of their courts and the ability to obtain binding criminal convictions.

B. The decision of the lower court opens the door to a claim of conflict of interest in any case in which an attorney must make difficult ethical decisions.

The lower court's conclusion that this case presents an actual conflict of interest, which is necessary for finding a presumption of inadequate assistance of counsel,[11] is erroneous. None of the actions indicated by the attorney, which might have resulted in a situation of actual conflict had the client persisted in his stated intent to commit perjury, were ever taken, and, thus, the "conflict" never developed. All the attorney actually did was advise his client of the *potential* conflict in the event of actual perjury, much as an attorney advises clients of the *potential* for conflict in a multiple representation situation.[12] In the

---

11 Strickland v. Washington, 104 S.Ct. 2052, 2067 (1984), citing Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980).

12 In this case, the potential for conflict evaporated when the defendant decided to tell the truth. The Supreme Court cases cited by the Eighth Circuit regarding the conflict, Strickland v. Washington, 104 S.Ct. 2052 (1984), and Cuyler v. Sullivan, 446 U.S. 335 (1980), refer to conflicts in the situation of multiple clients in a single case, a situation which arises only in a specific type of case, and for which there are reasonable guidelines.

latter case, this Court has pointed out that "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance,"[13] and "a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel."[14]

In fact, one could easily conclude that a greater conflict would be involved in following the ABA Proposed Defense Function Standards, which the Eighth Circuit apparently approves. Those standards suggest a course of conduct including discreetly making a record of the fact that the defendant is taking the stand against the advice of counsel, refraining from direct examination "in the conventional manner" and refraining from arguing or relying upon the false testimony.[15] Surely, trying to walk this fine line between protecting oneself in a continuing representation while trying to adequately represent the client and not reveal the perjury presents a much greater conflict than dealing with the problem in the privacy of the attorney-client relationship, and putting it behind.

The interest of an attorney in protecting himself against charges of criminal or unethical behavior is always present, and his actions are always influenced in some manner by such considerations. In this sense, the attorney is always a "potential adversary" of his client. To the extent that the attorney in this case was put in a situation of "conflict," *every* attorney temporarily facing such a dilemma, no matter how it is ultimately resolved, can be said to have exactly the same conflict of interest.

---

13 Cuyler v. Sullivan, 446 U.S. at 350.

14 Id. at 348.

15 ABA Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function, Proposed Defense Function Standard 4-7.7(c) (2 ed. 1980), appended to 744 F.2d at 1331.

C. *The lower court's decision is potentially more detrimental to effective assistance of counsel than the action taken by the defendant's attorney.*

A client is not expected automatically to know what the consequences of his actions might be. The very basis for the right to counsel lies in the fact that the client generally will not have the knowledge necessary to make informed choices about his case without counsel. It would be anomolous indeed if an attorney could not advise his client regarding the legality, advisability, and possible consequences of such a serious action as that contemplated by the defendant herein for fear of thereby being found constitutionally "ineffective."

Additionally, the attorney's action in preventing the perjury was in the client's best interest, and not just a means of protecting his own interest, as the lower court suggests. Any attorney who would acquiesce in the commission of a new crime by his client, subject to another prosecution, is not serving the best interests of his client. Furthermore, given that the defense was based on a theory of self-defense, making the credibility of the defendant very important,[16] the attorney would have been remiss had he *not* made every effort to deter the defendant in his perjurious intent, which would have been extremely disadvantageous before the jury. Thus the decision below would hurt the very class of persons the court of appeals sought to protect, namely persons accused of crime and needing effective advice of counsel.

CONCLUSION

The Court should grant its writ of certiorari to consider the substantial questions presented.

---

16 There were eyewitnesses whose testimony could have been used to impeach the defendant. The attorney was able to observe the defendant and make his own professional evaluation of how the contemplated testimony might be received by the fact finder.

Respectfully submitted,

Jean Fleming Powers
Assistant Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

David Crump
Professor of Law
South Texas College of Law

Office-Supreme Court, U.S.
FILED
JUN 24 1985
ALEXANDER L. STEVAS,
CLERK

(7)

No. 84-1321

In The

Supreme Court of the United States

October Term, 1983

CRISPUS NIX, WARDEN OF
THE IOWA STATE PENITENTIARY,

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

JOINT APPENDIX

THOMAS J. MILLER
Attorney General of Iowa

BRENT R. APPEL
Deputy Attorney General
Hoover Building
Des Moines, Iowa 50319
(515) 281-5166

THOMAS D. McGRANE
Assistant Attorney General

Attorneys for Petitioner

PATRICK R. GRADY
214 First Street N.W.
Cedar Rapids, Iowa 52404
(319) 398-3690

Attorney for Respondent

Petition for Certiorari Filed February 15, 1985
Certiorari Granted April 15, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

61 pp

INDEX

	Page
Statement of Previous Filings	1
Chronological List of Relevant Docket Entries	2
Transcript of Shorthand Notes, *State of Iowa v. Whiteside,* CRF #3199-0277, (May 9-12, 1977)	3
Pretrial Colloquy Between Court and Counsel	4
Excerpts from Testimony of James R. Stout	4
Excerpts from Testimony of Kathy Sauer	9
Excerpts from Testimony of James Kinkead	22
Excerpts from Testimony of Richard White	25
Excerpts from Testimony of Terry Fowler	30
Excerpts from Testimony of Derrick Doolin	39
Excerpts from Testimony of Emanuel Charles R. Whiteside	46
Exhibit A, Supplemental Motion for New Trial, *State v. Whiteside* (Iowa Dist. Ct., Linn County CRF #3199-0277)	55
Ruling on Supplemental Motion for New Trial and Order Setting Sentencing (Iowa Dist. Ct., Linn County CRF #3199-0277) (Aug. 16, 1977)	56

STATEMENT OF PREVIOUS FILINGS

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix accompanying the Petition for A Writ of Certiorari.

	Page
Opinion of the United States Court of Appeals for the Eighth Circuit, filed September 19, 1984	A1
Order of the United States Court of Appeals for the Eighth Circuit denying rehearing en banc, filed December 24, 1984	A22
Opinion of the United States District Court for the Southern District of Iowa, filed December 7, 1982	A34
Excerpts from the Appendix of *Whiteside v. Scurr*, 272 N.W.2d 468 (Iowa 1978)	A46
Application for Permission to Withdraw as Attorneys for Defendant	A46
Hearing on Defendant's Request for Appointment of Attorney Thomas Koehler	A46
Testimony of Defendant Whiteside at Hearing on Supplemental Motion for New Trial	A57
Testimony of Attorney Gary L. Robinson at Hearing on Supplemental Motion for New Trial	A75

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	*Proceedings*
August 16, 1977	Ruling on Supplemental Motion for New Trial and Order Settling Sentencing
December 20, 1978	Opinion and Judgment of the Supreme Court of the State of Iowa
December 7, 1982	Order of the United States District Court Denying Writ of Habeas Corpus
September 19, 1984	Opinion and Judgment of the United States Court of Appeals for the Eighth Circuit
December 24, 1984	Order of the United States Court of Appeals for the Eighth Circuit denying rehearing en banc
November 13, 1984	Order Extending time for filing Petition for a Writ of Certiorari to February 16, 1985
February 15, 1984	Petition for Writ of Certiorari filed with United States Supreme Court
April 15, 1984	Order of United States Supreme Court granting petition for writ of certiorari

(p. 1) IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

CRF #3199-0277

STATE OF IOWA,

Plaintiff,

vs.

EMANUEL CHARLES R. WHITESIDE,

Defendant.

TRANSCRIPT OF SHORTHAND NOTES

Trial of the above-entitled case commenced May 9, 1977, in the Linn County Courthouse, Cedar Rapids, Iowa, before Judge Harold D. Vietor and a Jury.

Appearances:

Mr. Harold Denton
Assistant County Attorney
Linn County Courthouse
Cedar Rapids, Iowa

Mr. Glenn Johnson
Assistant County Attorney
Linn County Courthouse
Cedar Rapids, Iowa For the Plaintiff.

Ms. Donna L. Paulsen
Attorney at Law
615 M N B Building
Cedar Rapids, Iowa

Mr. Gary L. Robinson
Attorney at Law
1544 2nd Ave. S.E.
Cedar Rapids, Iowa For the Defendant.

• • •

• • •

(p. 26) THE COURT: I understand this is essentially a self-defense case; is that right?

MR. ROBINSON: That's correct.

MS. PAULSEN: Yes.

THE COURT: The defendant will be asserting that whatever he did, he did in justifiable self-defense?

MR. ROBINSON: That is correct.

THE COURT: And it will be the burden of the State to prove otherwise and, of course, the right of the defendant to introduce any and all evidence that is relevant on the issue of self-defense.

MR. ROBINSON: That's correct.

• • •

(p. 53) JAMES R. STOUT,
called as a witness in behalf of the State, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. DENTON:

Q. Would you state your name and tell us in what city you reside?

A. James Raymond Stout; 36—or 37 36th, Kansas City, Missouri.

Q. Okay. Are you employed now in Kansas City?

A Yes, I am.

Q. And how long have you lived in Kansas City?

(p. 54) A. Since Friday.

Q. Now up until this past Friday were you living here in Cedar Rapids?

A. Yes, I was.

Q. Were you living in Cedar Rapids on February 7 and 8 of 1977?

A. Yes.

Q Could you tell us where you were living here in Cedar Rapids?

A. 839 4th Avenue, S.E.

Q. Okay. Now what kind of a building is that?

A. It's (sic) apartment complex.

Q. Okay. How many apartments are there in there, if you know?

A. Approximately ten.

Q. Was there an individual living there named Calvin Love?

A. Yes, there was.

Q. Did he live fairly close to your apartment?

A. Yes, he did.

Q. Okay. About how far away from your apartment did he live?

A. Approximately 15 feet and across the hall.

Q. Now was this a second or third floor apartment or what?

A. Second floor.

Q. Do you know if anyone was residing with Mr. Love?

A. Yes, there was.

Q. And who was it?

A. A girl by the name of Kathy Sauer.

Q. Were you acquainted with both Mr. Love and Miss Sauer?

(p. 55) A. Yes, I was.

Q. Would you say that you were a friend of both of them?

A. Yes.

Q. Did you see Mr. Love on February 7 of this year?

A. Yes, I did.

Q. Okay. About what time would you have seen Mr. Love?

A. Around 4:30, 5 o'clock in the evening.

• • •

(p. 56) Q. Now did you—could you tell us if you heard anything about two o'clock in the morning?

A. Yes, I did. I heard what appeared to be two to three pairs of footsteps coming up the stairs, at a fairly normal pace. They were loud. Heard the people go to Calvin's apartment and knock on the door. I heard Calvin holler, "Who is it?" But I did not hear a reply. And I guess after that he did let them in.

Q. Okay. Why don't you just tell us what you heard.

(p. 57) A. Okay. After I heard the door open—as he had a knife stuck in the door to keep it locked—after I heard the door open or closed and that was all I heard for approximately ten minutes or so. After that I heard some scuffling and some yelling in the apartment. I couldn't really make out what it was. But just a couple minutes after that I heard the door open and people running down the stairs.

Q. Okay. Now when you say—you say you heard people running down the stairs?

A. Right.

Q. This would have been shortly after two o'clocck?

A. Right. I heard a scream also before they ran.

Q. Okay. Now what happened after you heard the scream and the people running?

A. Kathy came over to my door and knocked on the door, and she was yelling something about Calvin had been hurt or stabbed, or something to that effect, and to come over. She sounded fairly loud and screaming, so I couldn't make out all of it. I told her I'd be over as soon as I got dressed, which I got dressed and I ran over there.

Q. Okay. Did she appear to you to be—was she hysterical or—

MR. ROBINSON: Objection. Calls for an opinion, conclusion of the witness. No foundation as to competency.

THE COURT: Overruled.

A. She was not hysterical. She was close to hysterical. She (p. 58) was running around and screaming at

the time. But I came over. I walked in the apartment and seen what had happened.

* * *

MR. DENTON: No further questions.

(p. 59) *Cross-Examination*

BY MR. ROBINSON:

(p. 60) Q. Mr. Stout, this apartment complex you've referred to is really an old house, isn't it?

A. Yes, it is.

* * *

(p. 66) Q. About what time did you arrive back at 839 Fourth Avenue, S.E.?

A. It was approximately 6:15, 6:30 in the morning, after we had left the police station.

Q. Was the Love apartment open or closed at that time?

A. It was closed.

Q. Was it padlocked?

A. Yes, it was.

Q. Did you subsequently break that padlock off?

A. The lock was broke the next morning—the next day at approximately noon. They came over, the family came over to collect Calvin's things. Kathy did not have the key with her, and she did not know where it was. This was Calvin's chain, hasp and lock, and the family

asked me to remove it from the (p. 67) door with the tools I had.

Q. So, in other words, you did break in the lock

A. I did break the lock with their permission.

Q. And Kathy Sauer wanted to get into the apartment and told you to break the lock, it was all right, and she'd go in?

A. Right.

Q. And her and the rest of the Love family then moved everything out; isn't that a fact?

A. Correct.

Q. Isn't it a fact they took carpeting off the floor and chains off the walls, right down to the bare wall?

A. They took any possession of Calvin's.

Q. About how long did this take?

A. Approximately an hour.

• • •

(p. 71) KATHY SAUER,

called as a witness in behalf of the State, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. DENTON:

Q. Would you state your name and tell us in what city you reside?

A. My name is Kathy Sauer. I live in Cedar Rapids.

Q. Now when you're answering questions will you please speak up (p. 72) as all these people here at the end have to hear you. Okay?

A. (Nod in the affirmative.)

Q. Were you residing at Cedar Rapids on February 7 and 8 of 1977?

A. Yes.

Q. Okay. Could you tell me where you were residing on those dates?

A. 839 Fourth Avenue, S.E.—

Q. Were you residing with somebody at that time?

A. Yes.

Q. Okay. And who was that?

A. Calvin Love.

Q. And how long had you been residing with Mr. Love?

A. Almost two months.

* * *

(p. 76) Q. Now can you tell us what happened about two o'clock that morning, February 8?

A. Someone knocked at the door. It was a quarter after two. And it woke Calvin up, and Calvin asked who it was. And he said, "Doolin." And Calvin said, "Who?" And he said, "Doolin." He said, let him in. So I walked to the door, and I asked again who it was. And they said, "Doolin." So I opened the door. And I seen Doolin and

this white boy. I didn't know who the—who he was, you know. And then I turned around (p. 77) and they followed me in and White—Charles walked in after him.

Q. Okay. What happened after these three men entered the room? Where did you go after they entered the room?

A. Set on the bed.

Q. Now you indicated that one of these—one of these men was named Doolin?

A. (Nod in the affirmative.)

Q. Did you know him?

A. I've seen him.

Q. Okay. Where did he go once he entered the room?

A. He went to this—they all walked in on the side, and then Charles walked around to the side of bed Calvin was laying on. Then Doolin was standing at the foot of the bed, and Terry Fowler was standing over by the chair.

Q. Okay. Now Terry Fowler, is he the white person you referred to?

A. Um-humm. Yes.

Q. Okay. Now after these three people entered the room, can you tell me what happened then?

A. Charles asked for the reefer again and Calvin, he said that he didn't pay for it. They just argued again over it.

Q. Do you remember what was said between them back and forth?

A. Charles said he wanted the reefer. Calvin said, "Man, I thought we settled this." And he said, "No, I want my half." (p. 78) Calvin said, "Come back tomorrow and we'll settle it. Just leave."

Q. Okay. Did Charles leave?

A. No.

Q. Okay. What happened after they argued about it and that was said?

A. And then Charles, he put—he had his hand in his back pocket.

Q. Okay. Did Calvin say anything to him?

A. Yes.

Q. Okay. What did Calvin say to him?

A. He said, "Man, you better get your hand away from your shit."

Q. And what did Charles do? What did Charles say after that was said?

A. He said—he—the whole thing Calvin said was, "Man, you better get your hand away from your shit or I'm going to have Kathy get my shit from under the bed."

Q. Okay. What happened after that was said?

A. Calvin looked at me and winked.

Q. Okay. What did Charles do after that?

A. He said—Charles said, "If Kathy reaches for anything, she'd be dead before she gets to it."

Q. Okay. What happened after that was said?

A. Calvin went to get up off the bed.

Q. Okay. Did Calvin say anything to Terry Fowler?

(p. 79) A. Yes.

Q. Okay. And what was that?

A. Terry was taking off his coat, and Calvin said, "Man, what do you think you're doing?" And that was—

Q. What did Terry do once Calvin said that?

A. Put back on his coat.

Q. Okay. What did Calvin do after he saw Terry and told him that?

A. What did he do?

Q. What did Calvin do after he said that to Terry? What did Calvin do?

A. Calvin—what did Calvin do?

Q. What did Calvin do?

A. After he said that to Terr—

Q. After he spoke to Terry, what did Calvin do? Did he try to get up off the bed or what, after he saw Terry?

A. That was before. That was before Charles said anything to Calvin.

Q. That was first?

A. Right. That was first. That came before that.

Q. Okay. Now after this—after this now you said that Calvin started to get up; is that right?

A. Um-humm. Yes.

Q. Okay. Can you tell me then exactly what happened then?

A. Calvin went to get up out of the bed, and when he went to (p. 80) move, Charles grabbed him and stabbed him. And it was fast. It was real fast.

Q. Okay. Now were you off to the side of the bed; is that right?

A. Yes.

Q. From where you were, did you actually—did you actually see a knife or anything?

A. No.

Q. Okay. Can you tell us then, relate to us exactly what you saw happen after Charles grabbed Calvin.

A. I just seen motions.

Q. Okay. Can you tell us, if you remember, what motions you saw?

A. It was just like this. (Indicating.) It was just real quick. And it was—that was it. You know—do you understand what I mean?

Q. I want to make sure that the jury understands what you mean. Because, you know, you've got to kind of explain it to them. Because they're the ones that have to—that have to hear the testimony. So if you kind of explain it to them exactly what happened.

A. He took his hand out of his back pocket and stabbed him. It was just—it was like that. (Indicating.) And it was real fast. And Calvin fell.

Q. Okay. Was Calvin still in the bed?

A. He fell onto the bed.

Q. Okay. Had he actually managed to stand up when he was stabbed?

(p. 81) A. After he fell on the bed, he stood up once and then fell on the bed again.

Q. Okay. Did Calvin say anything after he was stabbed?

A. He didn't say nothing to nobody after—he said something to me before I called the ambulance.

Q. Now can you tell us then after Calvin was stabbed, exactly what happened after that?

A. I went to go over towards Calvin and then Charles started walking towards me, and he wanted the reefer. He said, "Where's it at?" And I grabbed it and I put it in his hand, and I said, "Here it is." I said, "Get out of here."

• • •

(p. 83) MR. DENTON: No further questions.

Cross-Examination

BY MR. ROBINSON:

• • •

(p. 95) Q. During the course of the time between 2:15 until the time Mr. Whiteside and the others left, did Calvin ever get completely off the bed and go towards the kitchen and turn off a light or something and get back on the bed?

A. Calvin got up once, and he did not go toward the kitchen. I don't—he didn't go towards the kitchen, I don't think.

Q. But he got completely out of bed on one occasion?

A. Yes.

Q. Did Calvin get up and completely leave the bed before or after he made the reference to you getting his shit from under the bed?

A. Before.

Q. And then he went back to the bed and sat down and laid down?

A. Yes.

Q. When he told you to get his shit from under the bed, what did that mean to you?

A. I didn't know what it was supposed to mean.

Q. You're sure it didn't mean a weapon?

A. We didn't have no weapons.

(p. 96) Q. And you never considered the term "shit" to mean a weapon?

A. That's what it meant. But when Calvin said that, I didn't know what—you know, I didn't understand him, because I figured we didn't have anything; that's why he winked at me.

Q. Are you sure he didn't say, "Katie, get me my weapon"?

A. He didn't call me Katie.

Q. I'm going to refer you again to your grand jury testimony, March 9, 1977. This is the people in the room with Mr. Denton. Do you recall the time I'm talking about?

A. Yes.

Q. Question. From Mr. Denton. "Okay. And then what happened when you realized that Whiteside was with them? What did you do?" Your answer goes on for about 19 lines on the one page, goes over, "Calvin says, 'Get your hand away from your shit,' and, 'Katie, get me my weapon.'"

A. That isn't what I said.

Q. Are you positive you didn't say that? Isn't it a fact that that's what you did say? (Handing witness transcript.)

A. That doesn't say Katie. That says Kathie.

Q. I'm sorry. You're right. That says "Kathie," with an i-e.

A. I sometimes spell my name Kathie, with an i-e.

Q. I see. Well, then did you testify on a prior occasion that Calvin said, "Kathy, get me my weapon"?

A. That Calvin said that?

Q. Yes.

(p. 97) A. Yes. But he did not use the word "weapon."

Q. So your testimony in front of the grand jury was incorrect?

• • •

(p. 98) A. It wasn't incorrect. It was—when I was talking to the people, instead of swearing, which I'm trying to cut down on, I used "weapon" in place of "shit."

Q. But they mean the same thing?

A. Yes.

Q. And you knew they meant the same thing on February 8 of 1977?

A. Yes.

Q. Kathy, you've also said that Calvin got out of the bed and then got back on. That was your testimony, I believe, today. Is that testimony correct?

A. Yes.

Q. And do you recall when we took your deposition —do you recall when we took your deposition, when I asked you some questions about a month ago? Do you recall that?

(p. 99) A. Yes.

Q. And I believe Mr. Denton was there and Mr. Johnson was there. Do you remember that?

A. Yes.

Q. And do you recall me asking you, referring to Calvin, "He doesn't get up at all; he just lays there?" And your response being, "Yeah." Do you recall that?

A. If that's what it says in—that's what I said.

Q. Okay. You said that at the deposition, and you said that Calvin got out of bed completely today. Which version is correct—

A. He got out of bed.

Q. —as you recall? You also indicated in the deposition that the whole thing took about three minutes, three or four minutes. Is that correct?

A. Three, four, five. Given five-minute span.

Q. It wasn't very long?

A. It wasn't really that long.

Q. And it's your position they arrived at 2:15, so they would have had to have left around 2:20?

A. 2:20, yeah. Around there.

Q. You would say they left at least by 2:20 in the morning?

A. Yes.

Q. Could they have left any earlier than that?

A. No.

(p. 100) Q. You had not seen a weapon in Mr. Whiteside's hand for any period of time prior to the actual incident itself, did you?

A. No.

Q. In other words, he didn't come into the apartment brandishing a knife or didn't stand in the apartment for those three or four minutes with that knife out, did he?

A. No.

Q. And the knife was only drawn—the stabbing took place and it was over, I believe you said, "so fast"?

A. Yes.

Q. Would you say it happened (snaps fingers) like that?

A. Yes.

Q. And it happened after Calvin made the reference to you to get your shit or to get his shit, which you translated into getting a weapon?

A. Yes.

* * *

(p. 101) Q. Did you go back to 839 Fourth Avenue, S.E., on February 8 after you left the hospital?

(p. 102) A. During the daytime.

Q. Do you recall what time you arrived there?

A. Oh, I really don't remember that. There was two detectives that come up there though.

Q. Was that before or after you entered into the apartment?

A. After.

Q. When you arrived back at 839 Fourth Avenue, was the apartment open or closed?

A. It was closed.

Q. And did you have a key?

A. I had a key, but the police took the key, so when —if when they locked it up, if they wanted to go back in or something like that. And I never did get my key back.

Q. So the police had sealed the apartment?

A. Yes.

Q. And you authorized them—you told Mr. Stout to force the lock and because you wanted to go back in the apartment?

A. To get some things. Yes, some clothes.

Q. And isn't it a fact that the same day everything was moved out of the apartment?

A. Yes.

Q. Including carpeting off the floor?

A. Yes.

Q. Kathy, Mr. Stout indicated that you had a butter knife in the door; is that correct?

(p. 103) A. Yes.

Q. Now that butter knife was there just for security purposes, to keep the door locked?

A. To keep the door locked.

Q. And you didn't consider that butter knife a weapon, did you?

A. No.

Q. When Calvin made the comment to you about the weapon, about getting his weapon or his shit, where was he at that time?

A. On the bed.

Q. Was this after he had gotten up and walked around, or whatever, and gone back to the bed?

A. Yes.

Q. And was he sitting on the bed at this time?

A. He was kind'a propped up a little bit.

Q. So he wasn't laying down?

A. He was laying at an angle.

Q. And then he subsequently moved toward Mr. Whiteside after he made the comment about getting his shit or his weapon?

A. After Mr. Whiteside made the comment of, "If she reaches for it, she'll be dead before she gets to it."

Q. But he did move toward Mr. Whiteside?

A. Yes.

Q. Were you in a position to observe his hands at this particular time? Were you paying any particular attention to him?

A. Whose hands?

(p. 104) Q. Calvin's.

A. I could see his hands.

Q. Where were they?

A. They were like this, when you're getting up. (Indicating.) Just like when you're getting up, where your hands normally are.

Q. Did he ever turn toward the pillows that were on the bed?

A. I don't recall.

• • •

(p. 170) JAMES KINKEAD,

called as a witness in behalf of the State, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. DENTON:

Q. Would you state your name and tell us how you're employed?

A. James Kinkead. I'm a patrolman for the Cedar Rapids Police Department.

• • •

(p. 173) Q. What did you do after—after you left the hospital?

A. We got the keys to the apartment from—I believe her name was Kathy Sauer.

Q. When you say "we," who's we?

A. Identification Officer White and myself.

Q. Okay. What did you and Officer White do?

A. We went back up to the apartment, and he took measurements of the apartment and pictures, and we looked around for any—anything that might be of evidentiary value, and we found none.

Q. Okay. Did you find any weapons or anything like that?

A. No, we didn't.

Q. Did you assist Officer White then in examining the apartment?

A. Yes.

Q. How would you describe that apartment?

A. Well, it was small, very untidy. Things were—I got the impression that they had just moved there. Things were still stored in boxes. It was very unkempt.

Q. Did you do anything other than assisting Officer White? Did you do anything after that?

A. I just went in the station, made my report.

Q. Okay. And that was the extent of your involvement in the case?

A. Yes.

• • •

(p. 175) Q. When you arrived at 3 o'clock, was the apartment open or closed?

A. It was locked by chain and padlock.

Q. And you had received—this is the key then you had received from Kathy Sauer?

A. Right.

Q. When you conducted your search, did you check the chest of drawers? Did you open the drawers to see what was inside the drawers, for a weapon?

A. I believe some of them were open. I didn't personally look in those drawers. Off—

Q. I'm sorry, I didn't let you finish.

A. Officer White may have; I don't know.

Q. But you personally did not?

A. No, I don't believe so.

Q. Did you check in the closet?

A. I can't even remember where the closet was.

Q. Did you check in the kitchen or any of the cupboards of the kitchen?

A. Yes. I looked in the kitchen and the bathroom.

Q. And the area around the bed?

A. Yes.

Q. And isn't it a fact at that time you were looking for a knife?

A. We were looking for a knife or anything that might be of evidence.

(p. 176) Q. And this took you approximately 15 minutes?

A. Fifteen or 20 minutes.

Q. When you left, what did you do to the apartment?

A. We locked it back up.

• • •

(p. 190) RICHARD WHITE,

called as a witness in behalf of the State, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. DENTON:

Q. Would you state your name and tell us in what city you reside?

A. Richard White. Cedar Rapids, Iowa.

Q. And could you tell me how you are employed?

(p. 191) A. I'm an Identification Officer, Cedar Rapids, Iowa, Police Department.

• • •

(p. 192) Q. Okay. What did you do after the body had been removed?

A. I went directly to the apartment. I photographed the scene, made a cursory search for a possible weapon, talked to the officers on the scene in regards to what they had done at that point. I simply made a search of the room. As soon as we were satisfied that there was no weapon, I left the scene, proceeded to the hospital to determine the extent of injuries (p. 193) of the victim.

Q. Okay. What did you do after you left the scene?

A. I went directly to the hospital, the emergency room. I stood by there while the emergency room treated the victim. I stayed there until the victim was pronounced dead, approximately 2:42.

Q. Okay. What did you do after the victim was pronounced dead?

A. I talked to the officers at the hospital. Sergeant Hintz was on the scene. I advised him that I would need someone to go back to the scene with me to further investigate the scene in regard to dimensions of the room, make

a further search for anything that might be evidence in regards to the case.

Q. Okay. Who went with you?

A. Officer Kinkead.

Q. Okay. And what time did you return to 839 Fourth Avenue, S.E.?

A. I don't recall the exact time. We had been gone approximately 30 to 45 minutes from the time of my first arrival.

Q. And what did you do when you returned to the scene?

A. Upon returning to the scene, I went directly to the apartment, went inside, made a further search, again in mind looking for a weapon. It had been indicated to us that there might possibly be drugs involved. We made observations of things laying around the apartment, keeping in mind the weapon and any possible drugs or paraphernalia. Made a complete search (p. 194) of the apartment in regards to the rooms immediately adjacent to the scene. Went ahead and made measurements of the perimeters of the room. That was about the extent of it.

Q. Okay. Did you locate any weapons?

A. No, we didn't.

• • •

(p. 197) Q. When you left the—when you left the apartment the first time and went to the hospital, did you make any effort to secure the apartment?

A. Yes, we did. I had security key from Kathy Sauer who was at the apartment when I arrived. This key was to a padlock which was used to secure the door along with a piece of chain which went through the door and the door frame. We put this chain through the appropriate hole in the door and put the padlock on the chain, securing it.

Q. Okay. And when you returned, was that padlock still on the door?

A. Yes, it was.

Q. And then you processed the scene; is that right?

A. Yes.

Q. Was there any other entrance to the apartment, if you can (p. 198) recall?

A. There was another door entering the apartment from the bathroom. However, this was secured. I don't recall exactly how—it was either nailed—we attempted to open this door, and it was secured in such a way that we couldn't force it open.

* * *

(p. 201) *Cross-Examination*

BY MR. ROBINSON:

Q. Officer, when you arrived at 839 Fourth Avenue, S.E., what condition was the apartment in?

A. Well, as I stated, when I entered the apartment the officer had secured the scene. I found the furniture

in the indicated approximate positions—the couch on top of the (p. 202) chair. The bed was in disarray. The bedding pulled back. The chalk mark on the floor indicating the position of the victim as the ambulance crew had found him. Nothing really other than that was made note of at the time.

Q. Did you yourself seal the scene of the crime then when you left the first time?

A. Yes, I did. I placed a padlock on the chain which secured the only entrance to the apartment.

Q. And at that point in time there was no one else in the apartment itself?

A. No, there wasn't.

Q. And did you advise Miss Sauer that you were sealing the apartment?

A. Before she left the apartment we advised her that we would be securing the apartment. We asked her for the key, which she turned over to us. We told her that it would remain secured until we felt that it could be released.

Q. And you notified her that until you had released the scene then that that apartment was to remain secure?

A. Yes, I did.

Q. Is it important to secure the scene of a crime?

A. Very important, yes.

Q. Why is that?

A. For the preservation of any possible evidence.

Q. And to keep people from possibly removing items of evidence?

(p. 203) A. Yes.

Q. When you returned the second time to the apartment, it was still secure?

A. Yes, it was.

Q. And you used the key to obtain entry—the key to the padlock?

A. Yes.

Q. And you conducted then another search at that time?

A. Yes.

Q. Did you search the drawers of the chest, the drawers that is referred to on your diagram?

A. One of the drawers was standing open. I observed that there were items of clothing in this drawer. That's the extent of any search of that particular area.

Q. You did not search the other drawers of that particular chest of drawers then?

A. No, I didn't.

• • •

(p. 227) TERRY FOWLER,

called as a witness in behalf of the State, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. DENTON:

Q. Would you state your name and tell us in what city you reside?

A. Terry Jim Fowler; Newhall, Iowa.

Q. Okay. Now, Mr. Fowler, were you in Cedar Rapids on the night of February 7 and the morning of February 8, 1977?

A. Yes.

• • •

(p. 229) Q. Did you and the other two people discuss doing anything at two o'clock?

A. Yeah. "Let's go score some marijuana."

Q. Do you remember who said that?

A. Either Doolin or Whiteside. I don't remember.

Q. Okay. One or the other of them said that?

A. Yeah.

Q. Okay. And did you go anywhere then?

A. Yeah. We started walking. I didn't know where I was going. More or less a tag-along.

Q. Okay. Were you following those other two?

(p. 230) A. Yes.

Q. Okay. Did you go to—did you go to an apartment building near the 420 Club?

A. It was about—yeah, about four blocks from there.

Q. Okay. Would that have been on Fourth Avenue, Southeast?

A. Yes.

Q. Okay. Do you recall what you did when you got to the apartment there?

A. Went on up. Went on up the steps and knocked on the door.

Q. Okay. Do you recall who it was that knocked on the door?

A. Doolin.

Q. Now do you recall what was said after Doolin knocked on the door?

A. "Who is it?" And Doolin said, "Doolin."

Q. And what happened after that was said?

A. We—somebody came, the girl came and opened the door for us, and we came on in.

Q. Okay. Now would that have been Kathy Sauer that let you in?

A. Yeah.

Q. Okay. What did you do after you entered the apartment?

A. I went down, I went, sat on the couch. And Charles and Doolin went over to side of bed Calvin was on (sic).

Q. Okay. Now you refer to Calvin. Now who are you talking about?

A. The guy that was laying on the bed.

Q. Okay. There was somebody laying on the bed?

(p. 231) A. Yeah.

Q. Okay. Did you later learn that was Calvin Love?

A. Yeah.

Q. Okay. Now what did Doolin and Whiteside do when they went to the bed?

A. They wanted the marijuana or the money back.

Q. Okay. Now what happened after they asked for the money or the marijuana back?

A. He said, "Look under the bed."

Q. Okay. What happened after that?

A. Oh, they started arguing.

Q. And after they argued, what happened?

A. What?

Q. What happened after they argued?

A. I stood up. I got up to stand up and Calvin noticed me and started yelling, "Get out." And he got up and Charles stabbed him.

Q. Okay. What happened after Calvin was stabbed?

A. We were started—we were going to start going. We were going to leave. And the chick said, "Here, you have the reefer." We took the marijuana and we ran.

Q. Okay. The three of you left?

A. Yeah.

• • •

(p. 234) *Cross-Examination*

BY MR. ROBINSON:

Q. Terry, as a result of this incident you were arrested and charged, were you not?

A. Yes.

Q. And at a later proceeding you were given immunity by Mr. Denton and the State of Iowa to give testimony; isn't that a fact?

A. Yes.

Q. And all the charges were dropped against you if you testified for the State of Iowa; isn't that a fact?

A. Yes. But can I ask a question?

THE COURT: No.

Q. I prefer to ask the questions.

THE COURT: No, you just answer the questions—

* * *

(p. 237) Q. When you went into the apartment, was that apartment, was it real—was it as light as it is in here today?

A. No.

Q. As a matter of fact, it was pretty dark in there, wasn't it?

A. Yes.

Q. And it was pretty confined space in terms of where you could move, wasn't it?

A. Yes.

Q. And the couch that you were sitting on was pretty close to the bed and you had to squeeze between the couch and the bed, didn't you?

A. No.

Q. You could walk between it?

A. Yeah.

Q. Okay. Mr. Love was on the bed, was he not?

(p. 238) A. Yes.

Q. Was he lying on his stomach?

A. Yes.

Q. And Mr. Doolin went and sat on the bed next to Mr. Love, did he not?

A. Yes.

Q. And Mr. Whiteside remained standing as you were facing the bed, to the left of the bed; am I correct?

A. Left of Doolin.

Q. Okay. So Doolin was on the bed. So he was to the left even of Doolin?

A. No, he was about a foot back, by the wall.

Q. And the argument was about marijuana or getting money back?

A. Yes.

Q. And wasn't the argument about who owned the marijuana?

A. Could have been. I don't know.

Q. And Mr. Doolin and Mr. Whiteside were asserting that they owned the marijuana or at least half of the marijuana and Mr. Love was saying, "No, you don't"?

A. Yes.

Q. Do you recall, isn't it a fact, that at one time during the argument, very close to when the stabbing took place, and Mr. Love said he was going to get his gun out or get his piece out?

A. Yes.

(p. 239) Q. And in street terminology, what does "get your piece out" mean?

A. Gun, pistol.

Q. So when he said that, you thought he had a gun or a pistol?

A. Yeah.

Q. And after he said that, he then moved in the direction of Mr. Whiteside?

A. No.

Q. Did he move towards you?

A. He just started getting up.

Q. And isn't it a fact that he had told you to get out?

A. Yes.

Q. And had said, "White boy, don't take your jacket off in my house; get out of here"?

A. Could have. I don't remember.

Q. Or words to that effect?

A. Yeah.

Q. And so it was—the incident itself occurred when he was getting off the bed?

A. Yes, getting up on his knees.

Q. And it was after he had the reference to getting his piece out that this happened?

A. About—about five minutes—yeah.

Q. And while this is all—this is all happening at a very dark room that was difficult to see anything in; isn't that (p. 240) correct?

A. Yeah, but by that time my eyes were—I could still make out what, you know, what was going on.

Q. The room was dark?

A. Yeah, but it had a black light that gives off a little light.

Q. Is a black light the light that if you have like a white shirt on it makes it stand out?

A. Yeah.

Q. Now after you were arrested, you were taken to the police station and interviewed by Detective Millsap and Detective Ammeter, were you not?

A. Yes.

Q. And isn't it a fact that Detective Millsap and Detective Ammeter gave you a plastic bag similar to this and asked you if that plastic bag was the marijuana that you had seen?

A. No. They didn't say plastic bag. They said, "Is that the marijuana?"

Q. Okay. But they did show you some marijuana?

A. Yeah.

Q. And they asked you if that had been the marijuana that had been at Calvin's?

A. Yeah.

Q. Now it's a fact, is it not, that during the whole time that you were in Calvin Love's apartment, Charles Whiteside never once told Kathy Sauer that he was going to kill her, did he?

(p. 241) A. No.

Q. He never said that to her, did he?

A. Huh-huh.

Q. And even though you couldn't see well, there's no doubt you never heard that, did you?

A. Right.

Q. And it was she who suggested and she came to Mr. Whiteside and said, "Here, take the marijuana."

A. Yes.

MR. DENTON: I'm going to objecct to this form of questioning because I think it's permissible to lead a witness on cross-examination, but I think this has ceased to be leading and it's become testimony.

THE COURT: Overruled.

Q. I believe you answered "yes"?

A. Yes.

MR. ROBINSON: I have no further questions.

THE COURT: Any redirect?

Redirect Examination

BY MR. DENTON:

Q. Mr. Fowler, did you ever see Calvin attempt to reach under a pillow or anything for a gun?

A. No.

Q. Did Calvin have anything in his hands when he started to get up?

(p. 242) A. No.

Q. What did Calvin do after he was stabbed?

A. Fell right back to the bed.

Q. Do you remember Kathy Joy screaming at that time?

A. I think so.

Q. Okay. After—after she screamed, that was when she gave Charley the marijuana; is that right?

A. Yeah.

Q. Okay. Do you remember where she got the marijuana from?

A. Out of a dresser on the wall, built into the wall.

* * *

(p. 262) DERRICK E. DOOLIN,

called as a witness in behalf of the defendant, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. ROBINSON:

Q. Could you state your full name for the record and spell your last name please.

A. Derrick Eugene Doolin. D-o-o-l-i-n.

* * *

(p. 270) Q. Do you know about what time you arrived at Calvin Love's?

A. A little bit after two. I don't know what time exactly.

Q. Would it—you didn't—you just walked to Mr. Love's?

A. Yeah.

Q. What did you do when you arrived at Calvin Love's?

A. Went up and knocked on the door, I guess. Let us in.

Q. Who let you in?

A. That girl, Kathy girl.

Q. And where did you go in the room?

A. Around there by the bed and sat down.

Q. Did you sit down on the bed?

A. Yes.

Q. Where did Mr. Fowler go?

A. Sat down on the couch.

Q. Where did Charles go?

A. Around on the side of the bed.

Q. Was Charles on the same side of the bed you were on?

(p. 271) A. Yes.

Q. Did you have anything to say to Calvin?

A. Did I? Yeah. I asked him to turn me onto some reefer.

Q. And what was his response to that?

A. He said he didn't have any.

Q. What happened after he said that?

A. Charles said that, "Yes, he does. That's my reefer." He said he wanted a reefer.

Q. Okay. Charles said he wanted his reefer, referring to reefer that belonged to Charles?

A. Right.

Q. Who else was present besides Calvin?

A. That girl and Fowler and me.

Q. And Charles?

A. And C arles.

Q. And as far as you knew, the girl was there with Calvin?

A. Right.

Q. Was Calvin in bed?

A. Yes.

Q. Was he on his back or on his stomach?

A. On his back.

Q. Was he on his back the whole time?

A. Yes.

Q. And were you closer to Calvin than Mr. Fowler was?

A. Yes, I was.

(p. 272) Q. Were you closer to Calvin than Charley was?

A. Yes.

Q. Did the conversation between yourself and Charles and Calvin develop into an argument?

A. No, not really.

Q. What happened?

A. Well, when he said that he didn't have no reefer, Charles told him that he had his, and Calvin, he says something about—you know, acted like he didn't know what he was talking about. Told him he didn't have no reefer. And then he got up. Calvin was raising up or something because Fowler was taking off his coat. And he told the boy, he says—he says, "White boy, what you doing? Don't be taking your coat off in my house." Something like that. And—

Q. What happened after that?

A. After that, then he just—he got to talking to Charles. He got saying something to Charles. He kind'a knelt down, kind of bending over and stuff, acting like

he was getting some gun, getting a gun. Then he kind of just—he kind of just turned around and kind of jumped towards Charles, kind of, kind'a over me, towards Charles.

Q. Had Calvin said anything about a gun?

A. Yes. He told his girl to get him a piece, to get his piece.

Q. What if somebody says that, what does that mean to you?

A. A gun.

(p. 273) Q. Did you think Calvin had a gun?

A. I don't know. I didn't know what he had until he did that. You know, until he got doing that. Because he said that at least about two or three times. First he said, "Baby, get me my piece." That's as soon as Charles said he wanted the reefer.

Q. And it's your testimony that Calvin jumped Charles?

A. Um-humm.

Q. What happened when Calvin jumped Charles?

MR. DENTON: I'm going to object to this. I don't think that's exactly what the testimony was, and it's a leading testimonial question.

THE COURT: Overruled.

A. What happened?

Q. Yes.

A. It looked like they just got to fighting and stuff. You know, like they was hitting each other and stuff. Then

all of a sudden Calvin just turned around and lay back down, pulled the covers up over by his shoulders and stuff.

Q. During this fight between Calvin and Charles, did you see a weapon of any kind in Charles' hand?

A. No, I didn't see nothing.

Q. Was it—would you say it was dark in that room?

A. Yes.

Q. The visibility wasn't very good?

(p. 274) A. No, it wasn't.

Q. When you went to Calvin's, did you have in mind any plan to rob him?

A. No, I didn't.

Q. Had that ever been discussed?

A. No.

Q. Never been discussed, going up there and hurting Calvin or doing anything to him?

A. No.

Q. Did the fight between Calvin and Charles take place before or after Calvin said something about, "Baby, get me my piece," and jumped at Charles?

A. That happened afterwards, you know. First he was laying down. Soon as Charles said he wanted a reefer, something like that, he said, "Baby, get me my piece." He got to shaking his head. Then Fowler got to take off his coat and stuff, he got up. He said, "Don't be taking your coat off in my house," or something. Then Charles

said something. He got—he acted like he was bending down, reaching up under the pillow for a gun or something. He kind of turned, jumped, raised up a little bit. I thought he had a gun or something.

Q. Now what happened after Calvin pulled the sheets back up, did you leave?

A. Yes. Charles said—I mean, Calvin says to go ahead and take it. And so that girl, she asked him what —you know, (p. 275) "What does Charles want?" He said he wanted his reefers. So she went over to the drawer and got it out of the drawer.

Q. And then you left?

A. Yup.

Q. Did you hear Charles at any time threaten to kill Kathy Sauer?

A. No, I haven't. That's the first time I ever heard of her name.

MR. ROBINSON: I don't believe I have anything further.

THE COURT: You may cross-examine.

Cross-Examination

BY MR. DENTON:

Q. Did you ever see either Charles or Calvin with a gun or a knife?

A. Talking about the whole time I known them?

Q. The whole time that you were there that night.

A. Oh, no. No.

Q. You never saw either one of them—

A. No.

Q. —with a gun or knife?

A. No.

Q. Now when they started to fight, as you indicated, they were actually hitting each other?

A. Um-humm.

Q. Would you describe how they were hitting at each other?

A. Looked like they were fighting like with their hands kind of like above their shoulders or something.

* * *

(p. 285) EMANUEL CHARLES R. WHITESIDE,

the defendant, called as a witness on his own behalf, being duly sworn by the Court, testified as follows:

Direct Examination

BY MR. ROBINSON:

Q. Charley, could you state your full name for the Court Reporter and spell your last name please.

A. Emanuel Charles Ray Whiteside. W-h-i-t-e-s-i-d-e.

* * *

(p. 300) Q. Now what did you do when you arrived at the apartment building itself?

A. When I arrived at Calvin's apartment, I was the first one at the door, so I opened the door and everybody went in, as naturally. And we went on up the steps.

This is a very small step, and we got to the door, to Calvin's apartment.

Q. Now you've heard Officer Kinkead testify that these are very narrow steps?

A. They are very narrow.

Q. Okay. What happened when you arrived at Calvin's door?

A. When we got to Calvin's apartment, it was—I think it was on the second floor. Derrick was in the front. Fowler was second, and I was third. Derrick knocked on the door, and there was a voice answered from the inside.

Q. Do you recall what the voice said?

A. The voice was, "Who is it?"

Q. What was the response to that?

A. And Derrick say, "This is Derrick."

Q. Was the door to the apartment opened?

A. No, sir. There it wasn't open.

Q. Was it later opened by someone?

(p. 301) A. Yes, it was.

Q. Who opened it?

A. Kathy Sauer.

Q. When she opened the door to the apartment, did you go inside?

A. Yes, we did.

Q. Where did Mr. Fowler go?

A. I think Fowler took a seat on the davenport.

Q. Where did Mr. Doolin go?

A. Doolin went over by the bed where Calvin was lying down, and he sit down on the bed.

Q. Where did you go?

A. I followed Derrick. I went over by the head of the bed, where Calvin's head was lying, and I was standing there while he was talking.

Q. Where did Kathy Sauer go, if you remember?

A. Calvin—excuse me. Kathy Sauer took a seat across the room, in a reclining chair.

Q. Was that room—was it dark in the room?

A. Very much dark.

Q. Were there any overhead lights on?

A. Not to my knowledge, there wasn't any lights on at all.

Q. Could there have been a couple small lights on, a red light or something?

A. I didn't see anything on.

Q. Well, how were you able to see in the room?

(p. 302) A. It was—we was getting some glare from the outside like, from the window, a street light or something to that effect.

Q. You were able to make out shapes and—

A. Definitely, yes.

Q. Can you relate to the Court and to the ladies and gentlemen of the jury what happened next?

A. While I was standing there, Derrick was talking to Calvin Love, and Derrick asked Calvin, he say, "Why don't you give me some of the marijuana back? We can smoke it here. Give me part of it, anything." It was getting into a conversation about the marijuana. So Calvin seemed to have got, you know, got angry or something about it. So I didn't want any conflict to start. I say, "Well, just give us part of it. We'll sit right here and smoke it." So at that time he seemed to get more frustrated, got angry, and he told his girl friend, who was sitting across the room, he said, "Give me my piece," and I took that very close; it scared me. And I kind of stepped back, you know, and I thought for sure that he had a weapon.

Q. What happened after he said, "Get me my piece"?

A. When he said, "Give me my piece," Calvin stuck his hand under a pillow—

Q. What happened after that?

A. And at this time he just encountered me.

Q. What do you mean by "encountered"?

(p. 303) A. What do I mean by encounter?

Q. Yes.

A. I mean that he attacked me.

Q. He came off the bed at you?

A. That is correct.

Q. Were you still armed at this time?

A. Yes, sir, I was.

Q. And what happened?

A. When Calvin—when Calvin attacked me, I didn't see—there was no way for me to move. And Doolin was sitting on the bed like this. And I noticed—I just knew this man had a gun or something, and I couldn't get by, and he was already after me like this. So I kind of threw up my hand like this, and I kind'a pushed to get him back off me. The thing happened so fast. I actually—I don't know what happened. I can't recall anything of what happened.

Q. But you did stab him, didn't you?

A. Yes, I did cut him.

Q. And this took place after he made the reference to getting his piece?

A. That is correct.

Q. Did you think that Calvin had a gun?

A. Most definitely I thought that.

Q. Why did you think that?

A. Because of Calvin's reputation, his brother's reputation, (p. 304) because of the prior conversation that Calvin and I had, I didn't have no other choice but to think he had a gun. And when he told his girl friend to give him his piece, I couldn't retreat. I couldn't do anything.

Q. What happened after the altercation between you and Calvin?

A. Everybody started moving, you know. And I'm frightened; I'm scared myself. And this girl say, "You want—you want your marijuana?" And I said, "Yes, give me my half." And she gave me my half and we left.

Q. Did you threaten that girl at any time?

A. No, sir, I did not.

Q. Did you say you were going to kill her?

A. No, sir, I did not.

Q. She's testified, and you heard her testify here in open court that you said you were going to kill her; is that testimony correct?

A. That testimony is false.

Q. Then the three of you left Calvin's apartment?

A. That is correct.

Q. What did you do with the knife?

A. When I was leaving out of Calvin's apartment, everybody started running. So did I. I was scared. I wanted to catch up with somebody so I could talk to somebody about what happened. I didn't know if I hurt Calvin or what. I said—one thing that came to my mind, "Throw that knife (p. 305) away." So I threw that knife away. Where I threw the knife, I don't know.

Q. But you threw it?

A. I threw the knife away.

Q. Charley, why did you go back to Calvin's the second time?

A. The reason why I went back to Calvin the second time, I was down there at the tavern, at 420, and my friend, he say, "Well, I know Calvin better than you do. I've been—known him for quite some time." He's been in Cedar Rapids very much longer than I have. He say,

"I probably can talk to him. He don't understand you. I can talk to him. Come on. Let's go back. I can get it back for you." I said, "Okay." So he kept insisting, insisting, so this is what happened. He wanted me to go back with him, and I went back with him.

Q. Did you have any intention of stabbing Calvin when you went back?

A. I had no intention of doing any harm to Calvin.

Q. Did you have any intention of robbing him of anything?

A. No, sir, I didn't.

Q. In fact, the marijuana we're talking about, you thought at least was half yours, didn't you?

A. That's right.

Q. Well, taking all you've said into account, why did you hurt him?

A. I didn't know I hurt him. And the reason I hurt him, because (p. 306) I was in danger and the people that came there to the apartment with me was in danger. I didn't know if Calvin was going to go up—beserk (sic), bananas, shoot everybody in there or what, and I couldn't retreat. I couldn't move back. The only thing I know—the thing happened so fast, so spontaneous, I didn't know what happened really. It just happened.

MR. ROBINSON: I have no further questions, Your Honor.

THE COURT: You may cross-examine.

Cross-Examination

BY MR. DENTON:

Q. Now, Mr. Whiteside, you didn't know how badly you had hurt Calvin?

A. No, sir, I didn't.

Q. What did Calvin do after you hurt him?

A. I think Calvin, he laid back on the bed, and he kind of balled up, and Derrick was telling me about the reefer, that's when I kind of looked like this. Just, you know, made me go, you know, bananas. I didn't know what's going on now.

Q. Did you have any idea how badly hurt Calvin was?

A. No, sir, I didn't.

Q. About how long was the blade on your knife?

A. My statement may not be correct, but I can give you a very intelligent guess. I'd say approximately about six and a half to seven inches.

(p. 307) Q. Did you know where you stabbed Calvin?

A. No, sir, I didn't.

Q. Did you have any idea where you stabbed him?

A. No, sir, I didn't.

Q. You just knew you had stabbed him?

A. I just knew I had cut Calvin, yes.

* * *

(p. 312) Q. Now you knew when Calvin started to hit you, he didn't have anything in his hands, didn't you?

A. I couldn't tell if Calvin had anything in his hand or not. The thought that came to my mind was to protect myself. And when he got up and came at me like this, I didn't have no other choice but to think of protecting myself.

• • •

(p. 314) Q. Isn't it true that if you—you knew when you stabbed Calvin he didn't have his gun at that time?

A. No, I didn't.

Q. After you stabbed him when he fell back on the bed, did you see a gun?

A. No, sir, I didn't.

Q. And in fact you never saw Calvin with a gun or any other (p. 315) weapon?

A. Are you speaking pertaining to this at that time?

Q. At that time.

A. No, I didn't see a weapon or anything. All I knew that Calvin made a threat and told his girl to give him his shit, and he reached in a manner to get something from underneath the pillow, and he encountered me, and this is all I know that happened.

• • •

Supplemental Motion for a New Trial

State v. Whiteside (Iowa Dist. Ct., Linn Cty., CRF # 3199-0277)

EXHIBIT A

(handwritten statement)

She didn't move, I turn back to Calvin, which he was pulling a pistol from underneath the pillow and bed, which he was laying on, at this time I reacted, I stabbed him I thought in shoulder, he still reaching, I stabbed him again. Calvin girl friend yelled and ask me, do I want the reefer I said yea! give me my half. I assume that was my half, we left walking (after I through the knive) I went to my brother house Albert Whiteside 512 5th St. S.E. told him I think I might have kill some body I wanted some counceling & aid from of what to do, he got scared and told he to get the fuck out and throw the knive away. We went across the lawn next door to Terry Fowler house to smoke some reefer and talk about what happen. Derick Doolin convince me nothing was wrong and nothing was going to happen, lets go home. So Dereck and I went to our apartment. After that police came and got . . . (end of page 1)

/s/ Charles Whiteside

IN THE IOWA DISTRICT COURT IN AND FOR LINN COUNTY

CRF No. 3199-0277

STATE OF IOWA,

Plaintiff,

vs.

EMANUEL CHARLES R. WHITESIDE,

Defendant.

RULING ON SUPPLEMENTAL MOTION FOR RULING ON SUPPLEMENTAL MOTION FOR NEW TRIAL AND ORDER SETTING SENTENCING

Defendant's Supplemental Motion for New Trial was heard by the undersigned Judge on July 29, 1977. Defendant was personally present with his recently appointed counsel, Emmit J. George. The State was represented by Assistant Linn County Attorneys Harold L. Denton and Glenn Johnson. Evidence was received. On August 11, 1977, written Briefs of counsel were filed.

The Supplemental Motion for New Trial consists of paragraphs 7 and 8, paragraphs 1 through 6 having constituted the original Motion for New Trial, which has been overruled.

PARAGRAPH 7

Paragraph 7 of the Supplemental Motion for New Trial alleges that defendant did not receive a fair and impartial trial on the grounds that his former attorneys, Ms. Paulsen and Mr. Robinson, caused him to materially alter his testimony at the trial by coercion, undue influence, and other improper means.

In respect to paragraph 7, testimony given by defendant and testimony given by Ms. Paulsen and Mr. Robinson conflicted in certain respects. I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson.

Defendant has failed to prove the grounds he alleges in paragraph 7 of his Supplemental Motion for New Trial.

PARAGRAPH 8

Paragraph 8 of the Supplemental Motion for New Trial alleges that newly discovered evidence has been made available since the trial inasmuch as the defendant has recanted his trial testimony on material matters.

Indeed, defendant has recanted his trial testimony that he did not actually see a weapon in the victim's hand.

Recantation by a trial witness of the testimony he gave at trial may require the granting of a new trial. 58 Am.Jur.2d, New Trial, Sec. 175, pp. 390-392. See *State v. Compiano,* 261 Iowa 509, 154 N.W.2d 845; *State v. Thompson,* 241 Iowa 16, 39 N.W.2d 637. However, recantation of trial testimony cannot constitute grounds for the grant of a new trial when the person recanting his testimony is the defendant himself.

Defendant has failed to prove the grounds he alleges in paragraph 8 of his Supplemental Motion for New Trial.

RULING

Defendant's Supplemental Motion for New Trial is overruled.

ORDER

IT IS ORDERED that defendant appear in a courtroom of the Linn County Courthouse at Cedar Rapids, Iowa, with his counsel at 2:00 p.m. on August 26, 1977, for imposition of sentence.

Dated this 16th day of August, 1977.

/s/ Harold D. Vietor
Judge, Sixth Judicial District

Office-Supreme Court, U.S.
FILED
JUN 24 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1321

In The
Supreme Court of the United States
October Term, 1982

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

vs.

EMMANUAL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5166

THOMAS D. McGRANE
Assistant Attorney General

June 24, 1985

**Counsel of record*

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether criminal defense lawyers provide ineffective assistance of counsel by persuading their client not to commit perjury at his trial when their successful effort to prevent him from lying on the stand wins unanimous praise from the state supreme court and the conduct of the attorneys does not prejudice their client at trial.

2. Whether criminal defense lawyers, who, as officers of the court, admonish their client that they will take steps necessary to prevent him from committing perjury, violate their client's right to testify when the client subsequently abandons the perjury scheme and takes the stand in his own defense.

3. Whether criminal defense lawyers, who privately and confidentially persuade their client not to commit perjury on the stand, act in a fashion which causes a violation of their client's right to due process of law when the judge and jury at his state court trial are not informed of the defendant's abandoned perjury plan.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND PROFESSIONAL RESPONSIBILITY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	8
ARGUMENT:	
1. PRETRIAL ADMONITIONS CONFIDENTIALLY GIVEN BY A LAWYER TO A CLIENT WHO HAS UNAMBIGUOUSLY ANNOUNCED TO COUNSEL HIS INTENTION TO COMMIT PERJURY ARE NOT CONSTITUTIONALLY INFIRM WHERE THE ONLY IMPACT OF THE ADMONITIONS IS TO PREVENT THE CLIENT FROM COMMITTING THE CRIME OF PERJURY AT TRIAL.	11
A. The Validity Of A State Court Criminal Conviction Is Not Undermined By Pretrial Events That Do Not Taint The Trial Of The Accused.	13
B. The Admonitions Of Respondent's Lawyer Cannot Provide A Basis For Reversal Of His State Court Conviction In A Federal Habeas Corpus Proceeding On Ineffective Assistance Of Counsel Grounds Absent A Showing Of Actual Prejudice.	18
1. The rule in *Cuyler v. Sullivan* has no application where the alleged conflict of interest does not threaten the accuracy of factfinding in a criminal proceeding.	19

TABLE OF CONTENTS—Continued

Page

2. Even if *Cuyler* applies, the prerequisites for invoking the limited presumption of prejudice are not present. 20

a. The record reveals no actual conflict of interest. 20

b. No "lapse of advocacy" occurred that "actually affected the adequacy of representation." 22

C. The Respondent Has Failed To Demonstrate Actual Prejudice. 23

II. THE USE OF ADMONITIONS BY WHITESIDE'S LAWYER IN THIS CASE CANNOT BE CONSIDERED OUTSIDE THE WIDE RANGE OF PROFESSIONALLY COMPETENT ASSISTANCE EVEN IF CONSIDERED IN ISOLATION FROM WHAT ACTUALLY OCCURRED AT TRIAL. 24

A. A State Criminal Justice System May Permit Criminal Defense Lawyers To Admonish A Perjury-Determined Client That They Will Withdraw And Inform The Court If Their Client Insists On Committing The Crime Of Perjury. 25

1. Pretrial withdraw-and-inform admonitions given in confidence by defense lawyers to a perjury-determined client as authorized by state law do not violate a defendant's due process right to effective assistance of counsel. 29

2. The choice of withdraw-and-inform admonitions by Whiteside's lawyer was not conduct "outside the wide range of professionally competent assistance." 33

TABLE OF CONTENTS—Continued

Page

3. A constitutionally based "right to testify" is not violated when an attorney pursuant to the rules of a state criminal justice system prevents a client from committing perjury. 37

4. Withdraw-and-inform admonitions by defense lawyers to perjury-determined clients do not violate due process of law. 40

B. The Additional Admonition Of Whiteside's Attorney That If His Client Persisted In His Perjury Plan, The Lawyer "Probably Would Be Allowed To Impeach" His False Testimony Is Not Constitutionally Defective. 41

C. Because The Respondent Did Not Remember, Let Alone Rely Upon, His Lawyer's Inform And Impeach Admonitions, Or So-Called "Threat To Testify," They Do Not Provide A Basis For Federal Reversal Of Respondent's State Court Conviction. 45

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES

Barker v. Wingo, 407 U.S. 514 (1972) 32

Brady v. Maryland, 373 U.S. 83 (1963) 41

Brooks v. Tennessee, 406 U.S. 605 (1972) 31, 39

Committee on Professional Ethics, Etc. v. Crary, 245 N.W.2d 298 (Iowa 1978) 10, 26, 43

Cuyler v. Sullivan, 446 U.S. 335 (1980) 18, 19, 22, 23, 45

Faretta v. California, 422 U.S. 806 (1975) 30, 33, 39

Ferguson v. Georgia, 365 U.S. 570 (1961) 38

Gideon v. Wainwright, 372 U.S. 335 (1963) 13, 32

Glasser v. United States, 315 U.S. 60 (1942) 19

Harris v. New York, 401 U.S. 222 (1971) 14, 21, 38, 39, 46

Harrison v. Maryland, 276 Md. 122, 345 A.2d 830 (1975) 44

Herring v. New York, 422 U.S. 853 (1975) 36

Holloway v. Arkansas, 435 U.S. 475 (1978) 19, 40

Hughes v. State, 513 P.2d 1115 (Alaska 1973) 38

Hutter Northern Trust Co. v. Door County Chamber of Commerce, 467 F.2d 1075 (7th Cir. 1972) 35

In re Branch, 70 Cal.2d 200, 74 Cal.Rptr. 238, 449 P.2d 174 (1969) 21

In re Investigation to Locate Jane Doe, 101 Misc. 2d 388, 420 N.Y.S.2d 996 (1979) 44

In re Michael, 326 U.S. 224 (1945) 31

In re Winship, 397 U.S. 358 (1970) 30, 31

Johnson v. Zerbst, 304 U.S. 458 (1938) 13, 32

TABLE OF AUTHORITIES—Continued

Page

Jones v. Barnes, — U.S. —, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) 33

Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978) 12, 34, 41

Magida, ex rel. Vulcan Detinning Co. v. Continental Can Co., 12 F.R.D. 74 (S.D.N.Y. 1975), *aff'd* 231 F.2d 843 (2d Cir.), *cert. denied* 351 U.S. 972 (1956) 44

Maness v. Meyers, 419 U.S. 449 (1975) 44

McKissick v. United States, 379 F.2d 754 (5th Cir. 1967) 30

McKissick v. United States, 398 F.2d 342 (5th Cir. 1968) 43

Morris v. Slappy, 461 U.S. 1 (1983) 33, 34

People v. Robles, 2 Cal.3d 205, 85 Cal.Rptr. 116, 466 P.2d 710 (Cal. 1970) 38

Pointer v. Texas, 380 U.S. 400 (1965) 31

Powell v. Alabama, 287 U.S. 45 (1932) 13, 29, 32

Sims v. Lane, 411 F.2d 661 (7th Cir. 1969) *cert. denied* 396 U.S. 943 (1969) 38

Sims v. State, 246 Ind. 660, 208 N.E.2d 469 (1965) 38

State of Arizona v. Nobel, 514 P.2d 460 (Ariz. 1973) 38

State v. Henderson, 205 Kan. 231, 268 P.2d 136 (1970) 30

State v. Hutchinson, 458 S.W.2d 553 (Mo. 1970) 38

State v. Laffer, 38 Iowa 422 (1874) 38

State v. Taylor, 211 N.W.2d 264 (Iowa 1973) 34

State v. Whiteside, 272 N.W.2d 468 (Iowa 1978) 7, 11, 24, 27, 33, 37, 46

TABLE OF AUTHORITIES—Continued

Page

Strickland v. Washington, — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ..... *Passim*

Sumner v. Mata, 449 U.S. 539 (1980) 11

Thornton v. United States, 357 A.2d 429 (D.C. App. 1976) 35

United States v. Agurs, 427 U.S. 97 (1976) 41

United States v. Bailey, 444 U.S. 394 (1980) 39

United States v. Bifield, 702 F.2d 342 (2nd Cir. 1983), *cert. denied* 461 U.S. 931 (1983) 39

United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984) .. 12

United States v. Grayson, 438 U.S. 41 (1978) 23

United States v. Hoffman, 733 F.2d 596, (9th Cir. 1984), *cert. denied* — U.S. —, 105 S. Ct. 1390, 83 L.Ed.2d 409 (1984) 21

United States v. Morrison, 449 U.S. 361 (1981) 9, 15, 18, 46

United States v. Petsas, 592 F.2d 525 (9th Cir. 1979), *cert. denied* 442 U.S. 910 (1979) 42

United States v. Wade, 388 U.S. 227 (1967) 16

United States ex rel. Wilcox v. Johnson, 555 F.2d 115 (1977) 12, 16

Whiteside v. Scurr, Civil No. 81-246-C (S.D. Iowa 1981) 1, 7, 15

Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984) 7, 18, 40, 42

Whiteside v. Scurr, 750 F.2d 713 (8th Cir. 1984) (*reh. denied, en banc*) 8, 17, 21, 24

TABLE OF AUTHORITIES—Continued

Page

CONSTITUTIONAL, STATUTORY, AND IOWA CODE OF PROFESSIONAL RESPONSIBILITY PROVISIONS

Fifth Amendment, United States Constitution 2, 38, 44

Sixth Amendment, United States Constitution ..... *passim*

Fourteenth Amendment, United States Constitution 3, 28

United States Code, Title 28, Section 2254(d) 3

Iowa Code section 602.1206 (1985) 27

Iowa Code section 622.10 (1985) 43

Iowa Code section 690.2 (1977) 37

Iowa Code section 721.1 (1977), now codified as section 820.2 (1985) 3, 26

Iowa Code section 721.2 (1977), now codified as section 720.3 (1985) 3, 27, 36

Iowa Code of Professional Responsibility

Canon 4 ..... 3, 27

Canon 7 ..... 4, 27

Disciplinary Rule 4-101 27

Disciplinary Rule 7-102 27

OTHER AUTHORITIES

ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution and Defense Function (1971) 34

ABA Project of Standards Relating to the Defense Function, 7.7 (Approved Draft 1971) 26

ABA Model Rules of Professional Conduct § 3.3, Comment (1983) 26, 30, 35, 39

TABLE OF AUTHORITIES—Continued

Page

Alabama Code of Professional Responsibility, 7-102(B) (1) 28

Beaney, *The Right to Counsel in American Courts* (1955) 29

Callan and David, *Professional Responsibility and the Duty of Confidentiality Disclosure of Client Misconduct in an Adversary System*, 29 Rutgers L. Rev. 332 (1976) 25

Comment, *Attorney-Client Privilege*, 91 Harv.L.Rev. 464 (1977) 44

Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee*, 50 U. Chi. L. Rev. 1380 (1983) 32

Connecticut Code of Professional Responsibility, DR 4-101(C) (3) 28

Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3 (1951) 26

District of Columbia Code of Professional Responsibility, DR 7-102(B) (1) 28

Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy"*, 4 Stan. L. Rev. 349 (1952) 26

Fed. R. of Evid. 611 35

Florida Code of Professional Responsibility, DR 4-101(D) (2) (1980) 28

Frankel, *The Search for Truth, An Umpired View*, 123 U. Pa. L. Rev. 1031 (1975) 26

Freedman, *Judge Frankel's Search for Truth*, 123 U. Pa. L. Rev. 1060 (1975) 26

TABLE OF AUTHORITIES—Continued

Page

Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966) 25

Idaho Code of Professional Responsibility, DR 4-101 (C) (3) 28

Iowa R. of Evid. 611(a) 35

Louisiana Code of Professional Responsibility, DR 4-101(C) (3) 28

McCormick, C., *Law of Evidence* (E. Cleary, 2d ed. 1972) 35

Montana Code of Professional Responsibility, DR 4-101 (C) (3) 28

Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich. L. Rev. 1485 (1966) 26

North Carolina Code of Professional Responsibility, DR 7-102(B) (1) 28

Pennsylvania Code of Professional Responsibility, DR 4-101 (C) (3) 28

Wolfram, *Client Perjury*, 50 So. Cal. L. Rev. 809 (1977) 26, 27, 30

No. 84-1321

In The
Supreme Court of the United States
October Term, 1982

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

vs.

EMMANUAL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet. App. A1-21) is reported at 744 F.2d 1323 and the order denying rehearing en banc (Pet. App. A22-34) appears at 750 F.2d 713. The unpublished opinion of the United States District Court for the Southern District of Iowa, *Whiteside v. Scurr,* Civil No. 81-246-C (S.D. Iowa 1981) appears in the appendix

accompanying the petition for certiorari (Pet. App. A41-43). The opinion of the Iowa Supreme Court (Pet. App. A35-40) may be found at 272 N.W.2d 468.

JURISDICTION

The Court of Appeals entered its judgment in this case on September 19, 1984. (Pet. App. A1.) The Petitioner filed an application for extension of time in which to file a petition for writ of certiorari in order to seek rehearing en banc from the Court of Appeals before filing a petition for certiorari. On November 13, 1984, Justice Blackmun entered an order extending the time for filing a petition for writ of certiorari until February 16, 1985. (Pet. App. A44.) The Petitioner filed a petition for certiorari within the time period as extended by Justice Blackmun in his November 13, 1984, order. The Court granted the petition for certiorari on April 15, 1985. The Court's jurisdiction is invoked under 28 U.S.C. Section 1243(1).

CONSTITUTIONAL, STATUTORY, AND PROFESSIONAL RESPONSIBILITY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law. . . .

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

Fourteenth Amendment, United States Constitution

No state . . . shall . . . deprive any person of life, liberty, or property without due process of law.

United States Code Title 28, Section 2254(d)

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State Court, a determination after a hearing on the merits of a factual issue . . . shall be presumed correct . . .

Iowa Statutes

Section 721.1 (1977)

If any person, on oath or affirmation lawfully administered willfully and corruptly swear or affirm falsely to any material matter in any proceeding in any court of justice . . . he is guilty of perjury. . . .

Section 721.2 (1977)

If any person procures another to commit perjury, he is guilty of subornation of perjury. . . .

Iowa Code of Professional Responsibility

Canon 4: A Lawyer Should Preserve the Confidences and Secrets of a Client.

Disciplinary Rule 4-101;

(C) A lawyer may reveal;

• • •

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

Canon 7: A Lawyer Should Represent A Client Zealously Within the Bounds of the Law

Disciplinary Rule 7-102;

(A) In his representation of a client, a lawyer shall not;

* * *

(4) knowingly use perjured testimony or false evidence.

STATEMENT OF THE CASE

On February 8, 1977, Calvin Love was stabbed to death in connection with a drug transaction in his apartment in Cedar Rapids, Iowa. The record reveals that Love and his girlfriend received a late night visit from Whiteside, who was armed with a knife, and two associates. (App. 10, 49.) Whiteside and Love became involved in a bedside argument over drugs. (App. 11-12.) When Love attempted to rise from his bed, Whiteside inflicted a deep and fatal gash through the chest of Love with a knife. (App. 14.)

The state charged Whiteside with murder in connection with the death of Love. The Iowa District Court appointed Thomas M. Horan and Timothy S. White to represent Whiteside. (Pet. App. A46.) Whiteside "didn't feel comfortable" with Horan and White, who were former prosecutors (Pet. App. A58), and sought to have Thomas L. Koehler replace them. An associate in Koehler's law firm, however, had already undertaken to represent Derrick Doolin, who was also present at the scene

at the time of Love's murder. (Pet. App. A46-48.) Notwithstanding the potential conflict of interest, Whiteside adamantly insisted on representation by Koehler. Only after two court hearings and numerous consultations with White, Horan, and Koehler, was Whiteside finally convinced to accept representation from Gary L. Robinson. (Pet. App. A53.)

Whiteside consistently told his lawyers as they prepared his defense that he did not actually see a gun in Love's possession, but he was nevertheless convinced that Love had a gun. (Pet. App. A79.) None of the three eyewitnesses to the crime saw a gun (App. 19, 39, 44), however, and a police search in the small apartment conducted immediately after the incident revealed no weapon. (App. 26.) Robinson, after conducting a thorough pretrial investigation, came to the conclusion that Love in fact did not have a gun at the time of the homicide. (Pet. App. A78-82.)

About a week prior to trial, Robinson and an associate, Donna Paulsen, were reviewing questions they had written in preparation for trial. In response to one of the questions at the practice session, Whiteside shocked his lawyers by stating that he intended to testify that he had seen something "metallic" just before he stabbed Love. When Paulsen asked him why he had never claimed that before, Robinson recalled that Whiteside declared, "in Howard Cook's case, there was a gun. If I don't say I saw a gun, I'm dead." (Pet. App. A85.)

At a hearing on Whiteside's motion for a new trial, Robinson stated that he responded to the unexpected development by explaining to Whiteside that it was not

necessary for a gun to be present in order to establish self defense, and that to claim falsely that he actually saw a gun would be perjury. Robinson recalled that he told his client that he and his associate, "as officers of the court, we would be suborning perjury if we allowed him to do it" and admonished him that if he committed perjury "it would be my duty to advise the Court what he was doing." (Pet. App. 85.) Robinson also testified that he told his client that if he persisted, he would "ask the court for permission to withdraw" (Pet. App. 88) and that he "probably would be allowed to impeach that particular testimony" if Whiteside actually perjured himself on the stand. (Pet. App. A85.)

Whiteside also testified at the post-trial hearing. He told the court that while he wouldn't say he had a conflict with his attorney over his proposed testimony, "I got the impression at one time that maybe if I didn't go along with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." (Pet. App. A70.) Whiteside made no mention of "threats" by Robinson to advise the court of false testimony or testify against him.

Whatever the character of Robinson's admonitions, Whiteside elected to take the stand at trial and not falsely claim that he actually saw a gun on the person of Calvin Love. After the jury retired, Whiteside advised the court that he was satisfied with his lawyers. (Pet. App. A74.) The jury convicted him of second degree murder. Whiteside then announced that he was dissatisfied with his lawyers by filing a motion for a new trial which alleged, in part, that Robinson provided ineffective assistance of counsel by coercing him to alter his testi-

mony. The state district court found the facts to be as testified by Robinson and co-counsel Paulsen and denied the motion. (App. 56.)

Whiteside appealed to the Iowa Supreme Court, which upheld the conviction. On the issue of Robinson's efforts to prevent Whiteside from testifying that Love had a gun, the Court affirmed the finding of the trial court that counsel properly refused to be a partner in a dishonest and deceitful scheme. *State v. Whiteside,* 272 N.W.2d 468, 470 (Iowa 1978). (Pet. App. A37.)

Whiteside then filed a habeas corpus action in federal court. The district court, accepting the state court's factual finding that Whiteside intended to testify falsely, dispatched Whiteside's claim with the succinct holding that because there is no constitutional right to perjure oneself, Whiteside was not entitled to relief. *Whiteside v. Scurr,* Civ. No. 81-246-C, at 2 (S.D. Iowa 1981). (Pet. App. A43.)

The United States Court of Appeals for the Eighth Circuit reversed. While the court became the third tribunal to accept the factual finding of the state court that Whiteside was proposing to testify falsely, 744 F.2d at 1338 (Pet. App. A8), the panel nevertheless held that Whiteside's attorney, through his admonitions to his client, had deprived Whiteside of effective assistance of counsel, due process of law, and a constitutionally-based right to testify on his own behalf. (Pet. App. A1-21.) The Court further held that because Whiteside's lawyers had an actual conflict of interest with their client, no showing of prejudice was required in order to reverse the conviction. 744 F.2d at 1330. (Pet. App. 13.)

The state's suggestion for rehearing en banc was denied by a five to four margin. Judge John R. Gibson, joined by three colleagues, wrote a dissenting opinion which, citing *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), argued that because no prejudice to the petitioner had been demonstrated, the petition for writ of habeas corpus should be denied. *Whiteside v. Scurr,* 750 F.2d 713, 714-716 (8th Cir. 1984) (*reh. denied, en banc*). (Pet. App. A26-30.) Judge Fagg, also joined by three judges, wrote in a separate dissent that ineffective assistance of counsel does not occur when an attorney convinces his client to testify truthfully in a criminal proceeding. *Id.,* at 717-719. (Pet. App. A30-34.)

The Court of Appeals denied a stay of mandate pending determination of a petition for certiorari to this Court. Upon application by the petitioner and after the filing of a response from the respondent, Justice Blackmun granted a stay pending the timely filing and ultimate disposition of a petition for certiorari by this Court. (Pet. App. A44.) On April 15, this Court granted the petition.

———o———

SUMMARY OF ARGUMENT

This case presents the question of whether a state court criminal conviction may be overturned because of the successful effort by a defendant's lawyers to prevent their client from committing perjury at trial.

The facts are especially important to the resolution of the issue. The Respondent told his lawyers that he intended to testify falsely at his upcoming trial. His

lawyers responded with admonitions to their client. The jury at no time learned of the perjury discussion, and the only impact of the admonitions on the trial itself was the defeat of the perjury plan.

The Respondent's lawyers zealously represented him at trial, and the defendant testified on his own behalf. After the jury retired, the defendant advised the state trial court judge that he was satisfied with his lawyers' performance. After conviction, the Respondent launched an attack on his lawyers' efforts to prevent him from committing perjury.

Given these facts, the Respondent's state court criminal conviction is not subject to attack on the ground that his attorneys violated his right to effective assistance of counsel, due process of law, or right to testify on his own behalf. Pretrial admonitions confidentially given by a lawyer to a client who unambiguously announces the intention to commit perjury are not constitutionally infirm where the only impact of the admonitions is to prevent the client from committing the crime of perjury at trial. *United States v. Morrison,* 449 U.S. 361 (1981).

In addition, the use of admonitions by the Respondent's lawyers in this case cannot be considered "outside the wide range of professionally competent assistance." *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 698 (1984). Under our federal system, a state may permit criminal defense lawyers to admonish a perjury-determined client that they will withdraw and inform the court if their client insists on committing the crime of perjury.

The additional admonition of the Respondent's attorney that if the client persisted in the perjury plan, the lawyer would probably be allowed to impeach his false testimony is not constitutionally defective under the facts and circumstances of this case. Initially, the Court's characterization of the attorney's words as a "threat to testify" is very doubtful. The statement can easily be construed not as a threat to take the stand as a rebuttal witness, but simply to correct by cross-examination of one's own client any misimpressions that might have been caused by false testimony.

In any event, the impeachment admonition was entirely proper and consistent with state and federal law. Under Iowa law, a client's perjury plan is not protected by attorney-client privilege. *Committee on Professional Ethics, Etc. v. Crary,* 245 N.W. 2d 298, 306 (Iowa 1978). Even if some aspects of the attorney-client privilege are constitutionally protected, the constitutional cloak does not extend to confidences regarding firm intentions to commit a future crime, including the crime of perjury at a criminal trial.

The "threat to testify", along with the lawyer's warning to advise the court of the Respondent's perjury proposal, do not provide a basis for reversal of his conviction even if they are constitutionally infirm. The record shows that the Respondent did not remember, let alone rely upon, either admonition.

———o———

ARGUMENT

I. Pretrial Admonitions Confidentially Given By A Lawyer To A Client Who Has Unambiguously Announced To Counsel His Intention To Commit Perjury Are Not Constitutionally Infirm Where The Only Impact Of The Admonitions Is To Prevent The Client From Committing The Crime Of Perjury At Trial.

In considering whether the pretrial admonitions in this case provide a constitutional basis for a federal court to vacate Respondent's state court conviction, the case must be viewed through a lens established by four key facts.

First, Emmanual Charles Whiteside told his lawyers that he intended to testify falsely on the stand at his upcoming trial.[1] The controversy thus involves a hard-core, unadulterated attempt by a criminal defendant charged with first degree murder to "beat the system" by committing the crime of perjury at trial. The case must not be confused with and bears no resemblance to a situation where an attorney, acting as judge and jury rather than zealous advocate, refuses to defend a client

---

[1]The state trial court found the facts "to be as testified to by Ms. Paulsen and Mr. Robinson." (App. 56.) The Iowa Supreme Court, in affirming the state trial court, held that "counsel was convinced with good cause to believe [Respondent's] proposed testimony would be deliberately untruthful." *State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978). (Pet. App. 37.) These factual determinations are fairly supported by the record and are therefore presumptively correct. *Sumner v. Mata*, 449 U.S. 539, 544 (1980); 42 U.S.C. § 2254(d).

effectively simply because the lawyer is inclined to disbelieve the client's side of the story.[2]

Second, the lawyer[3] in this case gave the admonitions to his client in a confidential pretrial conference. Neither the judge nor the jury at the trial which resulted in Whiteside's conviction had the slightest knowledge of the perjury discussion. This case does not present the troublesome situation where the judge or factfinder is arguably unduly prejudiced by knowledge that the attorney of the accused has doubts about the client's version of events.[4]

Third, the only impact of the admonitions on the trial itself, the main event in the criminal process, was the prevention of perjury by the accused. The admonitions did not prevent Whiteside from testifying fully about the events that led to the death of Calvin Love.[5] In addition, there is no claim, aside from preventing the perjury, that Whiteside's attorneys mounted anything less than a zealous defense at trial or that the discussions

---

[2]*See United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (1977) (counsel seeks to withdraw without firm basis for belief that client was prepared to commit perjury).

[3]Lawyer Gary Robinson made the admonitions to Whiteside in the presence of another lawyer, Donna Paulsen. (App. 84.) Because the admonitions were spoken by Robinson, the singular term "lawyer" is used in reference to the admonitions even though two lawyers were present and participating in the confrontation.

[4]*See Lowery v. Cardwell*, 575 F.2d 727, 731 (9th Cir. 1978); *United States ex rel. Wilcox v. Johnson*, *supra* note 2, at 117 (client declines to take stand for fear of being forced to proceed without representation).

[5]*Contrast United States v. Curtis*, 742 F.2d 1070, 1076 (7th Cir. 1984) (lawyer refuses to place perjury-determined client on witness stand).

over the perjury issue so impaired the attorney-client relationship that effective representation at trial by his attorneys was not a realistic possibility.

Fourth, after the jury had retired, Whiteside informed the state court trial judge that he was satisfied with his lawyers' performance. (Pet. App. A74.) His sandbag-style complaint arose only after the jury returned with an unfavorable verdict.

In light of the accused's unambiguous declaration of intent to commit perjury, the confidential nature of his lawyer's admonitions, the extremely limited impact of the admonitions on the trial of the accused, and the accused's in-court statement of satisfaction with his lawyers after the jury retired, the Petitioner believes that the opinion and judgment of the Court of Appeals must be reversed.

A. The Validity Of A State Court Criminal Conviction Is Not Undermined By Pretrial Events That Do Not Taint The Trial Of The Accused.

The purpose of the due process guarantee of the right to effective assistance of counsel in state court proceedings is to advance the constitutional policy of producing reliable verdicts at criminal trials. The seminal due process cases involving Sixth Amendment rights in state court proceedings uniformly emphasize the role of counsel in promoting the truthfinding process of the adversary system. *See Powell v. Alabama,* 287 U.S. 45, 68-69 (1932); *Johnson v. Zerbst,* 304 U.S. 458, 463 (1938); *Gideon v. Wainwright,* 372 U.S. 335, 344-45 (1963). In *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 2069, 80 L.Ed.2d

674, 698 (1984), this Court recently reemphasized that "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." The Court in *Strickland* further declared that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as producing a just result." — U.S. at —, 104 S.Ct. at 2064, 80 L.Ed.2d at 692-93.

The only impact of counsel's challenged conduct at Whiteside's trial, however, was suppression of unquestionably false testimony. It would be absurd to argue that a lawyer who persuades his client not to commit perjury at trial eviscerates the "fundamental fairness of the proceeding" or so undermines the trial that the proceedings "cannot be relied upon as producing a just result." *Id.*

The manner in which Whiteside was prevented from committing the crime has absolutely no relevance to the validity of his criminal conviction. Whiteside had no constitutional right to commit perjury at trial. *Harris v. New York,* 401 U.S. 222, 225 (1971). While the Petitioner believes the conduct of Whiteside's attorneys in this case is above reproach, the evaluation of their conduct simply does not matter. Absent a right to commit perjury, even arguably wrongful actions by his lawyers to prevent perjury cannot be said to have "chilled" any constitutional right. The only impact of admonitions in this case was the suppression of false testimony. The District Court's summary dismissal of the ineffective assistance of

counsel argument in this case with the blunt observation that "there is no constitutional right to perjure oneself" was the correct approach. *Whiteside v. Scurr,* Civ. No. 81-246-C (S.D. Iowa, Dec. 7, 1982). (Pet. App. A43.)

Support for this conclusion may be found in *United States v. Morrison,* 449 U.S. 361 (1981). In this Sixth Amendment case, agents of the Drug Enforcement Agency met with the accused alone on two occasions after her indictment even though the officers were aware that she had retained counsel. At the meetings, the officers disparaged her lawyer and indicated that she would gain various benefits if she cooperated with them but would face a stiff jail term if she did not. 449 U.S. at 362. The District Court overruled a motion to dismiss the indictment and the parties entered into a conditional plea bargain. The Court of Appeals reversed holding that, in light of the government conduct, the indictment should have been dismissed with prejudice.

While this Court did not condone the government's behavior, which it characterized as "egregious," 449 U.S. at 363, it nonetheless upheld the plea bargain. The Court unanimously held that cases involving Sixth Amendment rights are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe upon the competing interest in the administration of criminal justice. 449 U.S. at 364. The Court further held that extraordinary relief was not appropriate in the absence of some adverse consequence to the representation received or to the fairness of the proceedings leading to the conviction. As in *Morrison,* the challenged conviction here must be affirmed since the lawyers' conduct did not taint

the factfinding process at trial in any way. *See also United States v. Wade,* 388 U.S. 227, 240-41 (1967) (pretrial identification obtained in violation of right to counsel does not provide basis for reversal of conviction if record clearly and convincingly shows lack of taint on the factfinding process).

A different situation would be presented if a client becomes so intimidated by counsel's antiperjury admonitions that the client is afraid to take the stand and testify truthfully. Suppose, for instance, that a lawyer advises a client that the client tends to shade the truth too much. The lawyer promises to listen intently to the client's testimony at the forthcoming trial and immediately advise the court of the slightest distortion in the client's testimony. As a result of this admonitional overkill, the client is so frightened that he or she declines to take the stand and testify truthfully.[6] When the factfinder is deprived of important information, confidence in the ultimate verdict is undermined. An argument could perhaps be made in this factual setting that the lawyer provided ineffective assistance of counsel under the *Strickland v. Washington* standards.

In this case, however, the constitutional bottom line is that the pretrial admonitions had absolutely no impact at trial other than to prevent Whiteside from offering perjured testimony. Absent any legally relevant impact at trial, the question of whether actual prejudice occurred does not need to be addressed. There is not one ounce of

---

[6]*Cf. United States ex rel. Wilcox v. Johnson, supra,* note 2 (client so fearful of lawyer's reaction that he decided not to testify at all).

unlawful impact to be placed in the *Strickland* scales to determine if actual prejudice occurred. Because his lawyer's confidential pretrial admonitions in this case resulted in the prevention of perjury and nothing more, they do not raise a Sixth Amendment issue regardless of their substantive content. *See Whiteside v. Scurr*, 750 F.2d at 718 (Fagg, J., dissenting).

This "no harm, no foul" approach to the pretrial client perjury issue has a strong practical justification. The rule avoids the specter of courts conducting evidentiary hearings to determine precisely what was said in private pretrial discussions where the only evidence will be competing sworn statements of the lawyer and the estranged client. Such judicial excursions into the pretrial minds of attorneys and clients would disrupt the criminal justice system by allowing hair-trigger analysis of an attorney's pretrial choice of perjury-discouraging words to provide the basis for attacking an otherwise sound criminal judgment.

As this case graphically illustrates, these collateral proceedings could be launched by a criminal defendant who expressly advises the court after the jury has retired that he or she is satisfied with the quality of representation, only to have a change of heart when the jury returns with a guilty verdict. (Pet. App. A74.) By proposing perjury, provoking admonitions from counsel, and then relenting, a cagey criminal defendant could attempt to use the Sixth Amendment to guarantee a right to two criminal trials.

The rule adopted by the Court of Appeals would also allow an unethical or incompetent attorney to inject reversible error into a proceeding by privately issuing un-

lawful admonitions. Even the most meticulous and law-abiding professional prosecutors would be totally powerless to prevent this potential snag in the criminal justice system.

In sum, the approach of the Court of Appeals will undermine the stability of jury verdicts in criminal trials where no impact on trial can be identified other than exclusion of perjured testimony. The systemic problems caused by judicial probing into the character of an attorney's perjury admonitions far outweigh any benefit that might be derived from the inquiry. *Cf. United States v. Morrison*, 449 U.S. at 364 (recognition of competing interests in administration of the criminal justice system).

B. The Admonitions Of Respondent's Lawyer Cannot Provide A Basis For Reversal Of His State Court Conviction In A Federal Habeas Corpus Proceeding On Ineffective Assistance Of Counsel Grounds Absent A Showing Of Actual Prejudice.

The Court of Appeals recognized that there is no constitutional right to commit perjury. *Whiteside v. Scurr*, 744 F.2d at 1328. (Pet. App. A8.) In reversing Whiteside's conviction, the Court did not advance the argument that Whiteside was prejudiced because he was not allowed to commit perjury at trial. Instead, the Court of Appeals, relying on *Cuyler v. Sullivan*, 446 U.S. 335 (1980), held that no showing of prejudice was required. 744 F.2d at 1330. (Pet. App. A13.) In *Cuyler*, this Court held that where a lawyer represents two or more defendants in the same criminal proceeding, there is "no need to indulge in nice calculations" as to the amount of prejudice attributed to the

conflict once it is known that "an actual conflict of interest adversely affects the lawyer's performance." 446 U.S. at 449.

1. The rule in Cuyler v. Sullivan has no application where the alleged conflict of interest does not threaten the accuracy of factfinding in a criminal proceeding.

The limited presumption of prejudice in *Cuyler* is necessary because of the inherent threat to the reliability of the factfinding process posed by multiple representation in a criminal trial. In the leading case of *Glasser v. United States,* 315 U.S. 60 (1942), an actual conflict of interest between multiple defendants inhibited an attorney from cross-examining a key witness. The attorney also felt constrained from raising an important evidentiary objection that might have aided one of his clients at the expense of another. 315 U.S. 72-74. These lapses of advocacy in *Glasser* cast serious doubt on the reliability of the ultimate result at trial.

The unfavorable impact of the actual conflict of interest on the quality of *Glasser's* legal defense was clear. It is often difficult, however, to determine precisely what effect this kind of conflict of interest has had on the factfinding process. As a result, traditional prejudice tests afford insufficient protection to a criminal defendant in many multiple representation situations. The lapses of advocacy are often of a highly subjective nature. Because of the difficulty in measuring impact on ultimate results, *Holloway v. Arkansas,* 435 U.S. 475, 490-91 (1978), a low threshold approach to the prejudice issue is necessary in

the multiple representation context to protect the integrity of the factfinding process.

The extension of *Cuyler* by the Court of Appeals to the present factual setting is unwarranted. By admonishing his client on the perjury issue, Robinson did not impair the reliability of the factfinding process at trial. He simply prevented his client from testifying falsely. The application of the low threshold prejudice test of *Cuyler* in the present case impairs the ability of the criminal justice system to protect itself from false testimony. The *Cuyler* rule should not be used as a sword to defeat its basic mission of promoting accurate results in the criminal justice system.

2. Even if Cuyler applies, the prerequisites for invoking the limited presumption of prejudice are not present.

Assuming *Cuyler* is applicable to situations where an attorney seeks to prevent client perjury, a two-pronged test must be satisfied. First, the record must reveal an "actual conflict of interest" sufficient to raise doubts about a lawyer's performance. 446 U.S. at 348. Second, there must be an "actual lapse in representation" that "actually affected the adequacy of representation." 446 U.S. at 449. Neither prong of *Cuyler* has been satisfied in this case.

a. The record reveals no actual conflict of interest.

In this case there was no "actual conflict of interest." A conflict of interest implies the collision of two legally

recognized rights. Whiteside, however, had no constitutionally or statutorily recognized right to commit perjury. *Harris v. New York*, 401 U.S. 222, 225 (1971). He also had no constitutional right to a lawyer willing to offer false evidence on his behalf.[7] *In re Branch*, 70 Cal.2d 200, 210-11, 74 Cal.Rptr. 238, 245, 449 P.2d 174, 181 (1969). As a result, Whiteside had no right that collided with the interests of his lawyers in preventing perjury. *See Whiteside v. Scurr*, 750 F.2d at 715 (Gibson, J., dissenting). (Pet. App. A27.)

The conversations between Whiteside and his lawyer also involved at best only a *potential* conflict of interest. Whiteside told his lawyers that he was prepared to lie on the stand, offering the opinion that " . . . in Howard Cook's case, there was a gun. If I don't say I saw a gun, I'm dead." (Pet. App. 85.) Had Whiteside persisted in his perjury proposal, the potential conflict might have ripened into an actual conflict of interest at trial. Instead, Whiteside, who refused to characterize the discussion between himself and his attorneys as a conflict (Pet. App. 70), "just dropped it [the perjury issue] entirely" after their brief private conversation. (Pet. App. 89.) When Whiteside decided not to press the point, the possibility of an actual conflict with his lawyers at trial was averted. Because Whiteside actually received zealous representation at trial, no actual conflict of interest was present. *See United States v. Hoffman*, 733 F.2d 596, 601-02 (9th Cir. 1984), *cert. denied* — U.S. —, 105 S.Ct. 1390, 83 L.Ed.2d 409 (1984).

---

[7] If the accused repeatedly and stubbornly persists on perpetrating a fraud upon the court, no constitutional problem is raised by requiring him or her to defend *pro se*. *See infra* at 38.

b. No "lapse of advocacy" occurred that "actually affected the adequacy of representation."

If an actual conflict of interest is present, it still must be shown that the conflict produced an "actual lapse of advocacy" that "actually affected the adequacy of representation" before the limited *Cuyler* presumption becomes operative. 446 U.S. at 549. While *Cuyler* instructs that "nice calculations" regarding the amount of prejudice are not required in actual conflict of interest settings, some palpable and identifiable adverse impact at trial is an indispensable prerequisite to the limited presumption of prejudice. *Strickland v. Washington*, — U.S. at —, 104 S.Ct. at 2067, 80 L.Ed.2d at 696.

The successful efforts of Whiteside's attorneys to convince their client not to commit perjury cannot be characterized as a "lapse of advocacy" that "actually affected the adequacy of representation." In fact, the effectiveness of counsel would have been suspect had Whiteside's lawyers not vigorously opposed his proposed false testimony in light of the fact that none of the three eyewitnesses saw a gun (App. 19, 39, 44) and the police search failed to discover a weapon. (App. 26.)

From a strategic point of view, Whiteside's testimony at trial that he thought Love had a gun, though he did not actually see one (App. 54), is far more consistent with the evidence, than his proposed false claim that he actually saw a gun. If Whiteside had claimed that he actually saw a weapon, he would have faced tough cross-examination by the prosecution. Why did the three other eyewitnesses not see the gun? (App. 19, 39, 44.) Why did Love ask his girlfriend, with a wink, to "get my shit

[gun] from under the bed" if he were already armed? (App. 12.) Why did Love not simply order the intruders out of his apartment with his gun if he were armed? If there were a gun, would not the police search, even if cursory, of the small apartment have revealed it? (App. 26.) An able prosecutor would have demolished Whiteside's credibility had he claimed he saw a gun.

Under the circumstances, Whiteside had a better chance of convincing the jury that he mistakenly thought Love was armed than he did of convincing them that there actually was a gun which no one else saw and the police failed to discover. It is ironic that the Court of Appeals hoisted Whiteside's lawyers on the petard of "ineffective assistance" when their client, had he defied counsel and testified falsely, would have increased his risk of being exposed as a liar before the judge and jury who ultimately would decide his fate. *See United States v. Grayson,* 438 U.S. 41, 52 (1978) (sentencing judge may consider apparent perjury of defendant in determining length of incarceration).

C. The Respondent Has Failed To Demonstrate Actual Prejudice.

In *Strickland v. Washington,* this Court held that a conviction cannot be set aside on ineffective assistance of counsel grounds absent a showing of prejudice. — U.S. at —, 104 S.Ct. at 2067, 80 L.Ed.2d at 696. As indicated above, there has not even been an adverse impact sufficient to trigger the *Cuyler* presumption, let alone meet the higher prejudice requirement of *Strickland.* The lack of actual prejudice alone provides a clear basis for reversal of the judgment and opinion of the Court of Appeals

in this case. *See Whiteside v. Scurr,* 750 F.2d at 715 (Gibson, J., dissenting). (Pet. App. A27.)

II. The Use Of Admonitions By Whiteside's Lawyer In This Case Cannot Be Considered Conduct Outside The Wide Range Of Professionally Competent Assistance Even If Considered In Isolation From What Actually Occurred At Trial.

If this Court were willing to approach the question of the conduct of Whiteside's lawyer from an academic point of view, in antiseptic isolation from what actually occurred at trial, the Petitioner believes it should hold that Robinson's use of admonitions in this case was entirely proper from any constitutional perspective. The withdraw-and-inform admonitions employed by Whiteside's lawyer were found by the Iowa Supreme Court to be consistent with state law and the Iowa Code of Professional Responsibility. *State v. Whiteside,* 272 N.W.2d at 470. The Court of Appeals, in effect, has held that a state, as a matter of constitutional law, cannot allow its lawyers to employ withdraw-and-inform admonitions. This holding amounts to an entirely unjustified constitutionalization of controversial notions of legal ethics and seriously erodes the ability of the states to control their criminal justice systems.

Furthermore, the lawyer's admonition that he "would probably be allowed to impeach" the false testimony that Whiteside proposed to offer does not raise problems of constitutional dimension in this case. While what Robinson meant by this statement is unclear, the Petitioner believes the admonition was a reasonable expression of potential consequences if Whiteside took the stand and committed perjury. Because the issues surrounding the "threat

to testify" language are somewhat different than those raised by the withdraw-and-inform admonitions, the "threat to testify" is treated separately below.

In addition, the Respondent did not remember, yet alone rely upon, his lawyer's warning that he would advise the court or impeach his testimony if he persisted in the perjury plan. These admonitions, even if defective, cannot provide a basis for reversal of the Respondent's conviction in this case.

A. A State Criminal Justice System May Permit Criminal Defense Lawyers To Admonish Confidentially A Perjury-Determined Client That They Will Withdraw And Inform The Court If Their Client Insists On Committing The Crime Of Perjury.

As the Court of Appeals properly noted, the question of the proper role of an attorney when faced with a client who has expressly announced to his counsel an intent to commit perjury "has been extensively debated, but by no means resolved, by several courts and many commentators." 744 F.2d at 1327. (Pet. App. A5.) At the risk of oversimplification, two schools of thought have participated in a heated tug-of-war that has produced intellectual rope burns among members of the bench and bar. A confidentiality-at-all-costs school argues that the adversary system requires strict adherence to principles of confidentiality even when an attorney is faced with a perjury-determined client.[8] *See* Freedman, *Professional*

---

[8]See e.g., Callan and David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct*

(Continued on next page)

Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469, 1477-80 (1966). A truth-in-justice school argues that loyalty to the truthfinding goal of the adversary system overrides notions of confidentiality when a client seeks to defraud the court. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality.* 64 Mich. L. Rev. 1485, 1492 (1966).[9]

The State of Iowa has taken sides in this controversy by placing strong emphasis on the truthfinding function of the adversary process. Perjury is a serious crime in Iowa. Iowa Code section 721.1 (1977), now codified as section 720.2 (1985). Under Iowa case law, a client who perjures himself acts outside the attorney-client relationship and is thus not entitled to the impenetrable cloak of confidentiality urged by the Freedman school. *Committee on Professional Ethics, Etc. v. Crary,* 245 N.W.2d 298, 306 (Iowa 1978). If the attorney "procures" false testimony at trial by questioning a witness knowing that the witness will make a false statement, the attorney could face crim-

---

(Continued from previous page)

in an Adversary System, 29 Rutgers L. Rev. 332, 394 (1976); Freedman, *Judge Frankel's Search for Truth,* 123 U. Pa. L. Rev. 1060 (1975); Curtis, *The Ethics of Advocacy,* 4 Stan. L. Rev. 3 (1951); *American Bar Association Project of Standards Relating to the Defense Function,* § 7.7 (Approved Draft 1971).

[9]See e.g., Wolfram, *Client Perjury,* 50 So. Cal. L. Rev. 809 (1977) (withdraw-and-inform sanctions even in criminal case); Frankel, *The Search for Truth, An Umpired View,* 123 U. Pa. L. Rev. 1031 (1975); Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy",* 4 Stan L. Rev. 349, 351 (1952); *American Bar Association Model Rules of Professional Conduct* § 3.3 (1983), Comment (if withdrawal will not remedy the situation, the advocate should make disclosure to the court).

inal prosecution for suborning perjury.[10] Iowa Code section 721.2(A)7, now codified as section 720.3 (1985).

The Iowa Code of Professional Responsibility, promulgated by the Iowa Supreme Court pursuant to state law, Iowa Code section 602.1206(19) (1985), sets forth a number of important provisions regulating attorney conduct when faced with a perjury-determined client. An Iowa attorney is admonished to advocate zealously the cause of a client "within the bounds of the law." Iowa Code of Professional Responsibility, Canon 7 (1985). The Disciplinary Rules accompanying the zealous representation canon direct that "a lawyer shall not . . . knowingly use perjured testimony or false evidence." DR 7-102(A)(4). While Canon 4 states that a lawyer should "preserve the confidences and secrets of a client," the Disciplinary Rule accompanying the Canon allows a lawyer to reveal "the intention of his client to commit a crime [perjury] and the information necessary to prevent the crime." Canon 4 DR 4-101(C)(3). In light of Iowa's strong judicially and legislatively expressed policy against perjury, it is not surprising that the State Supreme Court praised the Respondent's attorneys "for the high ethical manner" in which they handled Whiteside's perjury scheme. *State v. Whiteside,* 272 N.W.2d at 471. (Pet. App. A38.)

It is tempting to dive headlong, as did the Court of Appeals, into the treacherous intellectual currents generated by the ethical controversy. The Petitioner believes

---

[10]Whether criminal sanctions are appropriate where a lawyer presents perjured testimony has been subject to academic debate. *See* Wolfram, *supra* note 9, at 815 n. 25.

that Iowa has resolved the client prejury dilemma in the best possible way. Resolution of any constitutional questions presented by withdraw-and-inform admonitions, however, does not require determination of what the Court might perceive as the optimal method of accommodating the truthfinding and confidentiality interests.[11] The question is whether the State of Iowa, consistent with the due process clause of the Fourteenth Amendment, may choose to employ pretrial withdraw-and-inform admonitions in its balancing of the truthfinding and confidentiality interests implicated by the client perjury dilemma in a pretrial setting.

---

[11]The states have taken differing approaches to the client perjury issue. In Florida, the applicable Rule of Professional Responsibility expressly states that the attorney *shall* reveal the intention of his client to commit a crime to the court, which seems to apply to client perjury. Florida Code of Professional Responsibility, D-R 4-101(D)(2). Many other states at least allow attorneys to advise a court of perjury of their clients. *See e.g.*, Connecticut Code of Professional Responsibility, DR 4-101 (C)(3); Idaho Code of Professional Responsibility, DR 4-101(C) (3); Louisiana Code of Professional Responsibility, DR 4-101(C) (3); Pennsylvania Code of Professional Responsibility, DR 4-101(C)(3); Montana Code of Professional Responsibility DR 4-101(C)(3).

In contrast, Alabama allows an attorney to withdraw from employment if his client insists on committing perjury, but the code does not expressly allow a lawyer to advise the court. Alabama Code of Professional Responsibility DR 7-102(B)(1). In North Carolina, a lawyer is to withdraw "without necessarily revealing his reason for wishing to withdraw." North Carolina Code of Professional Responsibility, DR 7-102(B) (1). In the District of Columbia, the attorney is simply directed to "call upon his client to rectify" the perjury. District of Columbia Code of Professional Responsibility, DR 7-102(B) (1).

1. Pretrial withdraw-and-inform admonitions by defense lawyers to a perjury-determined client as authorized by state law do not violate a defendant's due process right to effective assistance of counsel.

The right to counsel provision of the Sixth Amendment to the Constitution simply states that "in all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." United States Constitution, Amend. VI. No comment or controversy accompanied the Congressional proposal of the right to counsel proposal, and the ratification proceedings reveal nothing concerning its contemporary meaning. Beaney, *The Right to Counsel in American Courts* at 27 (1955).

The Judiciary Act of 1789, signed by President Washington the day before the Sixth Amendment was proposed by Congress, provides some illumination of the scope of the right to counsel. Section 35 of the Judiciary Act provides that "in all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law *as by the rules of the said courts respectively shall be permitted to manage and conduct cases therein.*" Act of September 24, 1789, c. 20, 1 Stat. 73, 92 (emphasis supplied). Under the approach embraced by the Judiciary Act of 1789, the right to counsel is not one of unlimited advocacy, but rather "a right to the guiding hand of counsel at every step of the proceedings," *Powell v. Alabama,* 287 U.S. at 49, consistent with the rules of the courts.

In this case, the Respondent does not assert that he did not have "the guiding hand of counsel at every step of the proceedings," or that his attorneys, who con-

ferred with him at least twenty-three times before trial (Pet. App. A77), were anything less than conscientious and well prepared. Whiteside's only claim is that his attorneys, in complying with the letter and spirit of the rules of the Iowa criminal justice system on the perjury issue, provided ineffective assistance of counsel.

The State of Iowa, however, and all the other states, surely has the authority to control its own court processes in the client perjury area. Withdrawal has been recognized as a proper response by a lawyer to a client's perjury proposal. *See ABA Model Rules of Professional Conduct* 3.3, Comment (1983). *See also McKissick v. United States,* 379 F.2d 754, 761 (5th Cir. 1967); *State v. Henderson,* 205 Kan. 231, 239, 468 P.2d 136, 141 (1970). The notion that a lawyer may also inform the court is more controversial. It would be entirely inappropriate, however, to enshrine the highly debatable confidentiality-at-all-cost approach to legal ethics in the Constitution. Our basic document embraces consensus values, not those which provoke deep philosophical debate among our best legal minds. *See Faretta v. California,* 422 U.S. 806, 817-818 (1975); *In re Winship,* 397 U.S. 358, 361 (1970).

In a persuasive law review article, Professor Wolfram summarized the strong state interests in preventing perjury in criminal trials. The foremost state concern is the accuracy of results of the criminal justice system. The adversary system simply does not, and cannot, regularly produce just results based on distorted information.[12] As this Court has noted, "Perjured relevant testimony is at

---

[12]Wolfram, *supra* note 9, at 834.

war with justice, since it may produce a judgment not resting on truth." *In re Michael,* 326 U.S. 224, 227 (1945).

The risk of perjury-induced distortions is particularly high in serious criminal cases. When faced with the possibility of lengthy incarceration or even a death sentence, a perjury-inclined defendant will be more willing to risk detection in order to gain litigation advantage offered by false testimony.[13] In addition, a criminal trial offers an exceptional opportunity for effective defendant perjury. A criminal defendant has a constitutional right under the Sixth Amendment confrontation clause to be present and hear all of the government's evidence before deciding whether to testify in his own behalf. *Brooks v. Tennessee,* 406 U.S. 605, 607-12 (1972); *Pointer v. Texas,* 380 U.S. 400, 403-04 (1965). A perjury-determined defendant will thus have the advantage of hearing the entire case of the prosecution before he presents a fabricated story.[14]

The second important state interest behind antiperjury policies is the promotion of public confidence in the criminal justice system. *See In Re Winship,* 397 U.S. at 364 (reasonable doubt standard indispensible to command the respect and confidence of community in applications of criminal law). In the words of Professor Wolfram, the use of the adversary system for adjudication of disputes is predicated on the belief that the system enhances the social and political acceptability of its decisions.[15] Public acceptability is inversely related to the

---

[13] *Id.,* at 813.

[14] *Id.,* at 840, n.17.

[15] *Id.,* at 833.

common perception of the frequency of perjury induced error.

Weighing the social cost of erroneous judgments and undermined confidence in the criminal justice system that results from less stringent control of perjury against the purported benefits of preserving the confidentiality of a client's proposal to commit the crime of perjury is essentially a legislative function. It does not involve close analysis of case specific adjudicative facts, but broad empirical and value-laden inquiry. *Cf. Barker v. Wingo,* 407 U.S. 514, 523 (1972) (court should not engage in legislative or rulemaking activity in speedy trial context). Iowa may reasonably conclude that the adversary system itself would be unduly eroded by perjury policies less stringent than those it has adopted. The states should not be deprived of legislative breathing room in this delicate policy area absent weighty countervailing constitutional considerations.

Sufficiently weighty constitutional concerns cannot be found in the due process guarantee of the right to counsel. The due process cases extending aspects of the right to counsel to state court proceedings are based on the constitutional policy of promoting reliable verdicts *at trial. See Powell v. Alabama,* 287 U.S. at 68-69; *Johnson v. Zerbst,* 304 U.S. at 463; *Gideon v. Wainwright,* 372 U.S. at 344-45. *See* Comment, *Effective Assistance of Counsel: The Sixth Amendment and the Fair Trial Guarantee,* 50 U. Chi. L. Rev. 1380 (1983). The Respondent's effort to use the right to counsel to defend a client's ability to commit perjury cuts dead against the fundamental constitutional mission of the right to counsel.

Any purported interest in protecting a client's personal autonomy is not of constitutional dimension. While notions of personal autonomy may provide a basis for a right to proceed *without* counsel, *Faretta v. California*, 422 U.S. at 816-17, this Court has expressly rejected attempts to allow notions of personal autonomy to structure the attorney-client relationship in the name of the Sixth Amendment. *Morris v. Slappy*, 461 U.S. 1, 13-14 (1983) (no right to meaningful personal relationships with one's lawyer); *Jones v. Barnes*, — U.S. —, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983) (defense counsel does not have duty to raise every nonfrivolous issue requested by defendant). In any case, no claim has been made here that the lawyer-client discussions on the perjury issue so disrupted the attorney-client relationship that the lawyers could not mount a vigorous defense at trial. Whiteside told the state trial judge after the jury retired for deliberations that he was satisfied with the representation he received. (Pet. App. A74.)

2. The choice of withdraw-and-inform admonitions by Whiteside's lawyer was not conduct "outside the wide range of professionally competent assistance."

It might be argued that, as a matter of state law, an attorney in Iowa is not *required* to adopt a pretrial withdraw-and-inform approach when faced with a perjury-determined client. While the Iowa Supreme Court in *State v. Whiteside* strongly approved the withdraw-and-inform admonitions, it might be asserted that the opinion does not necessarily rule out other solutions. Assuming that an Iowa attorney does have a range of options under state law, it could be argued that the choice of pretrial

withdraw-and-inform admonitions by Respondent's attorney under the circumstances of this case was "outside the wide range of professionally competent assistance." *Strickland v. Washington,* — U.S. at —, 104 S.Ct. at 2069, 80 L.Ed.2d at 695. Regardless of whether the use of pretrial withdraw-and-inform admonitions in this case were a result of a state mandate or exercise of lawyers' discretion, the choice of remedy was reasonable.

The withdraw-and-inform approach has distinct advantages over other solutions to the client perjury dilemma. For instance, an attorney cannot honestly advise a client that he intends simply to withdraw from representation without explanation to the court. Most trial judges will not allow an appointed attorney to withdraw on the eve of trial without a compelling reason. *See State v. Taylor,* 211 N.W.2d 264, 267 (Iowa 1973). When forced with a judicial inquiry into the reason for withdrawal, it will not be sufficient for counsel to offer the vague explanation that the lawyer and client are at odds over defense strategy. *See Morris v. Slappy,* 461 U.S. at 12-13. If the lawyer refuses to be more specific, the nebulous reason for seeking withdrawal will telegraph the character of the problem to an experienced trial judge. *Lowery v. Cardwell,* 575 F.2d at 730-31.

It is sometimes proposed that an attorney confronted with a perjury-determined client should allow the client to testify as he or she wishes without the guidance of counsel. *See ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution and the Defense Function,* § 7.7 (Approved Draft 1971). Under this "free narrative" approach, the lawyer does not di-

rectly question the client about the subject area, and the lawyer refrains from making reference to the perjured testimony in closing arguments. *Thornton v. United States,* 357 A.2d 429, 436-38 (D.C. App. 1976). Such an awkward evidentiary presentation is not likely to be to the advantage of the lawyer's client at trial. It will alert most judges and many jurors to counsel's concerns about the accuracy of client testimony.[16] *See ABA Model Rule of Professional Conduct* 3.3, Comment. (Pet. App. A18.)

In addition, the prosecutor may object to the manner in which the testimony is being presented. The general rule in Iowa and elsewhere is that the decision whether to permit such a narrative rests with the sound discretion of the judge. *See* Fed. R. of Evid. 611; Iowa R. of Evid. 611(a); McCormick, C., *Law of Evidence,* § 5, at 7 (E. Cleary, 2d ed. 1972). The trial judge could simply refuse to allow the witness to testify in a narrative fashion. *Hutter Northern Trust v. Door County Chamber of Commerce,* 467 F.2d 1075, 1078 (7th Cir. 1972). In the alternative, the judge might well ask defense counsel to explain why the unusual procedure is necessary. In either circumstance, the effort to insulate the perjury-determined client from system-imposed inquiry will be defeated.

Finally, the quality of advocacy offered by the defense counsel will suffer under the free narrative solution. First, without the specific interrogation and guidance of an attorney's questions, the untrained defendant may unwittingly expose himself to devastating cross-examination by unnecessarily opening dangerous areas in direct

---

[16] *Id.,* at 850.

testimony. Second, an inarticulate client's free flow narrative may be so incoherent that it has a negative impact on a jury looking for a reasonable explanation for highly suspicious circumstances. Third, the ability of the lawyer to marshal convincingly the evidence in his closing argument, an extremely important stage at a jury trial, *see Herring v. New York,* 422 U.S. 853, 862 (1975), will be compromised by his client's dogged exercise of his claimed right to testify falsely. Given these risks and problems, an attorney better serves his client by persuading him or her not to commit perjury through strong admonitions in the privacy of pretrial consultations than by simply allowing the client to jump off the perjury precipice with the unjustified hope of landing safely in the outstretched arms of a sympathetic jury.

The final potential solution is that the lawyer should proceed to elicit the testimony from his client, even if the attorney knows it is false, and fully argue the fabrication to the jury. This is clearly not a permissible resolution under Iowa state law. *See* Iowa Code section 720.3 (1985). Certainly, the Sixth Amendment does not deprive Iowa of the authority to refuse to allow its lawyers knowingly to turn its courtrooms into theaters of attorney assisted fantasy.

Even if the theatrical approach were available, it would not have been a wise strategic choice in this case. Whiteside's attorneys obtained a good result for their client. They were able to persuade the jury to convict their client only of second degree murder, even though the record unequivocally established a basis for a first degree murder conviction. Had he brazenly claimed to

have actually seen a gun, the jury might not have been so lenient. Instead of attacking his lawyers, Whiteside should be thanking them for talking him out of his foolish scheme. Had his attorneys been less persuasive, Whiteside might now be serving a mandatory lifetime prison sentence for first degree murder, Iowa Code Section 690.2 (1977), instead of the forty year maximum sentence that was actually imposed. *State v. Whiteside,* 272 N.W.2d at 468. Their successful, confidential pretrial admonitions cannot be considered ineffective assistance of counsel under *Strickland.*

3. A constitutionally based "right to testify" is not violated when an attorney pursuant to the rules of a state criminal justice system prevents a client from committing perjury.

In addition to its ineffective assistance of counsel holding, the Court of Appeals held that "counsel's action impermissibly compromised appellant's right to testtify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony." 744 F.2d at 1329. (Pet. App. 12.) This holding reasonably may be construed to mean that whenever a lawyer threatens to withdraw in order to prevent a client from committing perjury, or for any reason relating to the client's wishes with respect to his own testimony, a constitutional violation occurs. The Court of Appeals conceded that the right to testify is not specifically expressed in the Constitution or the Bill of Rights, but found it implicit "in the fifth and fourteenth amendments' due process guarantees" and in the Sixth Amendment's "guarantee of the right to meet and confront

accusations, to be present and to present evidence and witnesses on one's behalf, including the right to present oneself as a witness." 744 F.2d at 1329-1330. (Pet. App. A12.)

A hundred years ago, a defendant in a criminal proceeding in Iowa was not a competent witness to testify on his own behalf. *State v. Laffer*, 38 Iowa 422 (1874). This restrictive rule was not necessarily prosecution oriented, for it was designed, in part, to prevent jurors from drawing adverse inferences from the exercise of a defendant's Fifth Amendment rights. *See Ferguson v. Georgia*, 365 U.S. 570, 586-90 (1961). In 1878, Iowa, following a national trend, legislatively repealed the prohibition against a defendant taking the stand in his own behalf. 17 G.A. Ch. 168 § 1 (1978).

This history demonstrates that if there is a constitutional right to testify on one's own behalf, it is a relatively recent development. A number of lower court cases have adhered to the view that a criminal defendant has no constitutional right to testify on his or her own behalf.[17] Recent cases of this Court, however, appear to assume a constitutional right to testify. In *Harris v. New York*, the statement is made that "every defendant is privileged to testify in his own defense, or to refuse to do so." 401 U.S. at 225. Similar passing observations may be found in

---

[17]*See Sims v. Lane*, 411 F.2d 661 (7th Cir. 1969), *cert. denied* 396 U.S. 943 (1969); *Sims v. State*, 246 Ind. 660, 208 N.E. 2d 469 (1965); *State v. Hutchinson*, 458 S.W.2d 553 (Mo. 1970) (en banc). *But see People v. Robles*, 2 Cal.3d 205, 85 Cal.Rptr. 116, 466 P.2d 710 (Cal. 1970); *Hughes v. State*, 513 P.2d 1115 (Alaska 1973); *State of Arizona v. Nobel*, 514 P.2d 460 (Ariz. 1973).

Faretta v. California, 422 U.S. at 819 n.15 and *Brooks v. Tennessee,* 406 U.S. at 612.

Assuming there is a right to testify of constitutional dimension, it is difficult to see how it was violated under the facts and circumstances of this case. A witness in a criminal trial, including the defendant, does not have a constitutional right to testify about anything he or she wishes. The testimony of the defendant is subject to numerous restraints such as relevance, the hearsay rule, and other concepts of admissibility. *See United States v. Bailey,* 444 U.S. 394, 415 (1980); *United States v. Bifield,* 702 F.2d 342, 350 (2nd Cir. 1983), *cert. denied* 461 U.S. 931 (1983). Similarly, a criminal defendant's privilege to testify does not include the right to commit perjury. *Harris v. New York,* 401 U.S. at 225.

A defendant cannot insist on committing blatant perjury and demand the appointment of a lawyer willing to allow use of patently false testimony. If a defendant insists on committing perjury, he or she has, in effect, refused to participate in the adversary system. Having declined to abide by its basic rules, the perjury-determined client, at least where the accused has announced expressly to his or her lawyer the intention to commit perjury, waives the right to assistance of counsel. If the accused repeatedly and stubbornly persists in perpetrating a deliberate fraud upon the court, no constitutional problem is raised by requiring him to defend *pro se* once he has been fully advised of the consequences of his action. *Faretta v. California,* 401 U.S. 806 (1975). *See ABA Model Rules of Professional Conduct* 3.3, Comment (de-

liberate abuse of right to counsel may be waiver of right to future representation).

4. Withdraw-and-inform admonitions by defense lawyers to prejury-determined clients do not violate due process of law.

The Court of Appeals vaguely states that counsel's action "deprived appellant of due process" as well as effective assistance of counsel. *Whiteside v. Scurr*, 744 F.2d at 1328. (Pet. App. A9.) The contours of the Court's due process theory are not explored. Apparently, the Court of Appeals believes a defendant may attack his state court conviction in federal court on due process grounds if it can be demonstrated only that the defendant's lawyer confidentially advised the defendant that if he or she insisted upon committing perjury, the lawyer would be required to withdraw and/or inform the court.

There is nothing unfair, however, with a lawyer privately insisting that his client tell the truth at trial and privately warning the client of potential legal consequences if he or she persisted in the perjury plan. The private counseling setting contrasts sharply with scenarios where other important participants in the judicial process become informed, against a client's wishes, of proposed perjury. For instance, if an attorney *at trial* is forced by his client's unexpected prejury to rise and advise the court of his client's false testimony, fundamental fairness might require the court to declare a mistrial. *See Holloway v. Arkansas*, 435 U.S. at 487 n.11. Under these circumstances, the declaration to the court by the defendant's lawyer that his client was committing perjury might be considered too prejudicial to allow the proceedings to con-

tinue. *See Lowery v. Cardwell,* 575 F.2d at 731. At this point, the defendant would face possible prosecution for perjury in addition to retrial on the original criminal charge. Because Whiteside followed his lawyer's advice, however, this difficult situation did not arise.

It also cannot be argued that a lawyer's successful effort to persuade his client not to testify falsely amounted to exclusion of evidence at trial in violation of due process based on the theory that the jury might have been fooled. Such a "sporting theory of justice" was expressly rejected in *Brady v. Maryland,* 373 U.S. 83, 90-91 (1963). Even when evidence is improperly withheld from the fact-finder, a conviction may be reversed on due process grounds only if the accuracy of the determination of guilt or innocence of the accused is drawn in question. *United States v. Agurs,* 427 U.S. 97, 108, 111-112 (1976). The exclusion of perjured testimony, however, cannot by definition be said to impeach the reliability of the jury's verdict.

B. The Additional Admonition Of Whiteside's Attorney That If His Client Persisted In His Perjury Plan, The Lawyer "Might Be Allowed To Impeach" His False Testimony Is Not Constitutionally Defective.

The Court of Appeals seemed especially irritated by the additional admonition by one of Whiteside's lawyers that if he committed the crime of perjury, the attorney "probably would be allowed to impeach that particular testimony." (Pet. App. A85.) The panel interpreted this statement as a "threat to testify" against Whiteside if he took the stand and committed perjury. 744 F.2d at 1329 (Pet. App. A11.)

The Court's holding that the "threat to testify" undermines Respondent's criminal conviction is erroneous. Initially, the Court's characterization of the attorney's words as a "threat to testify" is doubtful. The statement easily can be construed not as a threat by the lawyer to actually take the stand as a rebuttal witness but simply to correct by cross examination of his own client any misimpressions that might result through false testimony. *See United States v. Petsas,* 592 F.2d 525, 527 (9th Cir. 1979) *cert. denied* 442 U.S. 910 (1979).

From the narrow prospective of client self-interest, impeachment through questioning by his own lawyer, with opportunities for self correction, is often far preferable than exposure to cross-examination by a professional prosecutor. A strategy decision to attempt to correct false testimony in this case would not be an act of counsel outside the wide range of competent assistance in light of the fact that none of the three eyewitnesses to the crime saw a gun (App. 19, 39, 44) and no weapon was discovered in a police search of the victim's apartment shortly after the incident occurred. (App. 26.)

The Court of Appeals apparently believed that counsel was proposing to represent Whiteside at trial, then suddenly and dramatically switch to the prosecution side against his client as a "rebuttal witness" in the same proceeding. 744 F.2d at 1328. (Pet. App. A9.) A musical chairs procedure which allows a defense attorney to abandon his client at trial in full view of the factfinder and testify against him on veracity questions would give rise to a strong due process attack on any subsequent conviction.

Robinson, however, wanted no part of musical chairs. If his client insisted on perjury, Robinson announced in advance of trial that he wanted absolutely no role in it. If Whiteside wanted to proceed with his perjury plan, Robinson told him in no uncertain terms, he would ask permission to withdraw before trial. (Pet. App. 88.) He was seeking to avoid the musical chairs by refusing in advance to sit at the counsel table at trial.

Of course, Whiteside could have attempted to manipulate his lawyer into a difficult position by concealing his intent to commit perjury until he took the stand at trial. If Whiteside had surprised his attorney with perjured testimony, however, the trial would not likely have proceeded to judgment if Robinson acted according to his admonitions. Robinson would have moved to withdraw, informed the court of his reason, and a mistrial likely would have occurred. *McKissick v. United States,* 398 F.2d 342, 344 (5th Cir. 1968). Thus, if Robinson were to be a witness in *any* proceeding against Whiteside, it would not have been one in which he had also appeared before the factfinder as Whiteside's lawyer.

Under Iowa law, Whiteside's lawyers, if they had been forced to withdraw from representing Whiteside, later could have been subpoenaed by the prosecution to appear at a subsequent trial and forced to reveal communications regarding Whiteside's perjury plan. In Iowa, statutory attorney client privilege, Iowa Code section 622.10 (1985), does not include knowledge of client perjury within its scope. *Committee on Professional Ethics, etc. v. Crary,* 245 N.W. at 306. If Whiteside had actually taken the stand and testified falsely, no state law barrier would prevent his former lawyers from being allowed to impeach his false testimony.

It could be argued that whatever the scope of attorney-client privilege under state law, an attorney-client privilege of constitutional dimension emanates from the Sixth Amendment right to counsel. Where a client reveals to a lawyer facts and circumstances related to a crime, some degree of attorney-client privilege may be constitutionally required in order to afford full protection to the client's Fifth Amendment privilege against self incrimination. In no case to date, however, has this Court identified a generally applicable constitutionally protected attorney-client privilege. *See Maness v. Meyers,* 419 U.S. 449, 467 n.15 (1975). The several state courts that have addressed the issue have held that the attorney-client privilege is without constitutional dimension.[18] Even if some aspects of attorney-client privilege are constitutionally protected, the constitutional cloak does not extend to confidences regarding firm intentions to commit a future crime, including the crime of perjury at a criminal trial.

In sum, the lawyer's qualified admonition that he "probably would be allowed to impeach" his client's false testimony if he insisted on committing perjury was thus nothing less than an accurate statement of Iowa and constitutional law. A failure to warn Whiteside of this potential consequence would have raised a serious question of ineffective assistance of counsel.

---

[18] *In re Investigation to Locate Jane Doe,* 101 Misc.2d 388, 420 N.Y.S.2d 996, 998 (1979); *Harrison v. Maryland,* 276 Md. 122, 345 A.2d 830, 837 (1975). *See also Magida, ex rel. Vulcan Detinning Co. v. Continental Can Co.,* 12 F.R.D. 74, 76 (S.D. N.Y. 1975) *aff'd* 231 F.2d 843 (2d Cir.), *cert denied* 351 U.S. 972 (1956); Comment, *Attorney-Client Privilege,* 91 Harv.L. Rev. 464, 485-86 (1977).

C. Because The Respondent Did Not Remember, Let Alone Rely Upon, His Lawyer's Inform And Impeach Admonitions, They Do Not Provide A Basis For Federal Reversal Of Respondent's State Court Conviction.

The record reveals that the Respondent did not seem to remember, let alone rely upon, his lawyer's warning that he would advise the court or be allowed to impeach if he persisted in his perjury plan. At the hearing on his post-trial motion for a new trial. Whiteside recalled only that his attorney indicated he would withdraw if the perjury plan were pursued. Whiteside testified:

> Q: Did you go over the questions that Mr. Robinson would ask you at trial, before the trial?
>
> A: Yes.
>
> Q: And as you went over the questions, did the two of you come into conflict with regard to whether there was a weapon?
>
> A: I couldn't — I couldn't say a conflict. But I got the impression at one time that maybe if I didn't go along with — with what was happening, that it was no gun involved, maybe that he would pull out of my trial.

(Pet. App. at A70.)

At no time did Whiteside mention the admonition to inform the court or the so-called "threat to testify" as a reason for abandonment of his perjury plan. Just as philosophers tell us there is no sound in the forest when no one hears the crash of a fallen tree, no adverse impact, *Cuyler v. Sullivan*, 446 U.S. at 549, can possibly be traced to a lawyer's admonitions that are not communicated to a listening client.

CONCLUSION

In this case, the Respondent expressly informed his lawyers that he intended to testify falsely on the stand at his upcoming murder trial. His lawyers gave strong admonitions to the client in a confidential pretrial conference. Fortunately for both the lawyers and their client, Whiteside abandoned the perjury plan. Whiteside's lawyers then zealously advocated their client's cause at trial, where he took the stand to testify fully in his own defense.

The only impact of the admonitions at trial was the defeat of the proposed perjury plan. After the jury retired, the defendant expressed satisfaction with his lawyers' performance. Whiteside sought vacation of his conviction by challenging the conduct of his lawyers only after the verdict was rendered.

The conviction must be upheld. Whiteside has no constitutional right to commit perjury. *Harris v. New York,* 401 U.S. 222, 225 (1981). The admonitions of Whiteside's attorneys had utterly no impact on the reliability of the factfinding process. Any alleged error in the precise wording of the admonitions, therefore, does not provide a basis for reversal. *United States v. Morrison,* 449 U.S. 361, 364 (1981).

In any case, the lawyers' admonitions were entirely appropriate and cannot be considered conduct "outside the wide range of professionally competent assistance." *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674, 698 (1984). The admonitions were consistent with valid state law designed to inhibit perjury in Iowa courtrooms. *State v. Whiteside,* 272 N.W.2d 468, 470 (Iowa 1978).

Whiteside has succeeded in putting his attorneys on trial because of their high ethical standards without demonstrating anything other than the fact that they forced him to tell the truth at trial. This parody should be put to an end by reinstating his conviction.

For all the above reasons, it is urged that the judgment and opinion of the Court of Appeals must be reversed

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164

THOMAS D. MCGRANE
Assistant Attorney General

*Counsel of record

Supreme Court, U.S.
FILED
AUG 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CRISPUS NIX, Warden of
the Iowa State Penitentiary,

Petitioner,

v.

EMMANUEL CHARLES WHITESIDE,

Respondent.

On Writ Of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF FOR THE RESPONDENT

PATRICK REILLY GRADY
(Appointed by this Court)
Public Defender's Office
214 First Street S.W.
Cedar Rapids, Iowa 52404
(319) 398-3690
Counsel for Respondent

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether criminal defense lawyers provide ineffective assistance of counsel by persuading their client not to commit perjury at his trial when their successful effort to prevent him from lying on the stand wins unanimous praise from the state supreme court and the conduct of the attorneys does not prejudice their client at trial.

2. Whether criminal defense lawyers, who, as officers of the court, admonish their client that they will take steps necessary to prevent him from committing perjury, violate their client's right to testify when the client subsequently abandons the perjury scheme and takes the stand in his own defense.

3. Whether criminal defense lawyers, who privately and confidentially persuade their client not to commit perjury on the stand, act in a fashion which causes a violation of their client's right to due process of law when the judge and jury at his state court trial are not informed of the defendant's abandoned perjury plan.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL, STATUTORY, AND PROFESSIONAL RESPONSIBILITY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT TRIAL COUNSEL'S THREATS TO WITHDRAW FROM RESPONDENT'S CASE, INFORM THE TRIAL JUDGE AND TESTIFY AGAINST RESPONDENT IF RESPONDENT GAVE TESTIMONY TRIAL COUNSEL BELIEVED TO BE PERJURED, EVIDENCED AN ACTUAL CONFLICT OF INTEREST AND INEFFECTIVE ASSISTANCE OF COUNSEL WHICH JUSTIFIED A PRESUMPTION OF PREJUDICE SUFFICIENT TO JUSTIFY HABEAS CORPUS RELIEF	4
A. Even Assuming Respondent Was Going To Commit Perjury, Trial Counsel's Actions Were Not Justified	10
B. The Fact That Trial Counsel's Threats Were Not Disclosed To The Trial Court Or The Jury Did Not Limit Their Prejudicial Impact On Respondent's Right To Counsel	13
C. The Court Of Appeals Properly Applied The Presumption Of Prejudice For Conflict Of Interest Cases	17
D. The Timing Of Respondent's Claims Is Of No Significance Under These Circumstances	21
II. RESPONDENT WAS DENIED A FAIR TRIAL, DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S CONDITIONING FURTHER REPRESENTATION ON THE CONTENT OF RESPONDENT'S TESTIMONY	22
CONCLUSION	24
CERTIFICATE OF SERVICE	26
AFFIDAVIT OF SERVICE	26

TABLE OF AUTHORITIES

CASES: Page

Alicea v. *Gagnon*, 675 F.2d 913 (7th Cir. 1982)..... 23

Argersinger v. *Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), (concurring opinion)..... 9

Baldwin v. *New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970)..... 10

Brady v. *United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)..... 5

Brewer v. *Williams*, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977)..... 10

Brooks v. *Tennessee*, 406 U.S. 605, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972)..... 8, 13, 22

Butler v. *United States*, 414 A.2d 844 (C.A.D.C. 1980)..... 10, 11, 16

Commonwealth v. *Duffy*, 394 A.2d 965 (Pa. 1978)..... 20

Cuyler v. *Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)..... 10, 21, 24

Downton v. *Perini*, 511 F.Supp. 258 (N.D. Ohio 1981) .. 15

Duncan v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)..... 10

Faretta v. *California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)..... 12, 22, 23, 24

Ferguson v. *Georgia*, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961)..... 13, 14

Geders v. *United States*, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)..... 6

Glasser v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942)..... 9, 17

Harris v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971)..... 7, 11, 22, 23

Herring v. *New York*, 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)..... 14

Hoffa v. *United states*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966)..... 6, 9

Holloway v. *Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 425 (1978)..... 4

Imbler v. *Pachtman*, 424 U.S. 409, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976)..... 9, 11

In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) 22

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)..... 11

Table Of Authorities-- Continued

CASES: Page

Jackson v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 9

Johns v. *Smythe*, 176 F.Supp. 949 (E.D.Va. 1959) 14

Johnson v. *United States*, 404 A.2d 162 (C.A.D.C. 1979) 11

Jones v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983) 15, 22

Lowery v. *Cardwell*, 575 F.2d 727 (9th Cir. 1978) 12, 16

Maness v. *Meyers*, 419 U.S. 449, 95 S.Ct. 584, 42 L.Ed.2d 574 (1975) 9

Mastrian v. *McManus*, 554 F.2d 813 (8th Cir. 1977) 6

McMann v. *Richardson*, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) 5

Miranda v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 Ed.2d 694 (1966) 7, 13

Morris v. *Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983) 15

New Jersey v. *Portash*, 440 U.S. 450, 99 S.Ct. 1292, 59 L.Ed.2d 501 (1979) 7, 12, 13

Newcomb v. *State*, 651 P.2d 1176 (Ala. App. 1982) 15

North Carolina v. *Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970) 5

Oregon v. *Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975) 7

People v. *Meyers*, 263 N.E.2d 81 (Ill. 1970) 20

Pointer v. *Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) 9-10

Powell v. *Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed.2d 158 (1932) 5

Simmons v. *United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968) 23

State v. *Haffa*, 246 Iowa 1275, 71 N.W.2d 35 (1955) 20

State v. *Hendren*, 311 N.W.2d 61 (Iowa 1981) 14

State v. *Millspaugh*, 257 N.W.2d 513 (Iowa 1977) 21

Strickland v. *Washington*, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) 6, 17

Sumner v. *Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1980) 10

Trammel v. *United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) 6

Table Of Authorities— Continued

CASES: Page

United States v. *Bifield*, 702 F.2d 342 (2nd Cir. 1983) ... 23
United States v. *Brugman*, 655 F.2d 540 (4th Cir. 1981). 6
United States v. *Grayson*, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978) ... 23
United States v. *Hurt*, 543 F.2d 162 (D.C. Cir. 1976) ... 19
United States v. *Roberts*, 20 M.J. 689 (A.C.M.R. 1985) ... 15, 16
United States v. *Rosner*, 485 F.2d 1224 (2nd Cir. 1973) .. 6
United States v. *Wade*, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), (concurring opinion) ... 8
United States ex rel. Hart v. *Davenport*, 478 F.2d 203 (3rd Cir. 1973) ... 18-19
United States ex. rel. Simon v. *Murphy*, 349 F.Supp. 818 (E.D.Pa. 1972) ... 20
United States ex. rel. Sullivan v. *Cuyler*, 553 F.Supp. 1236 (E.D.Pa. 1982) ... 18, 19, 20
United States ex. rel. Wilcox v. *Johnson*, 555 F.2d 115 (3rd Cir. 1977) ... 11, 16, 22
Upjohn v. *United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) ... 6, 14
Virgin Islands v. *Zepp*, 748 F.2d 125 (3rd Cir. 1984) 19
Von Moltke v. *Gillies*, 332 U.S. 708, 68 S.Ct. 316, 92 L.Ed. 309 (1948) ... 17
Weatherford v. *Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) ... 6
Whiteside v. *Scurr*, 744 F.2d (8th Cir. 1984) 12, 16, 17, 22, 23
Williams v. *Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970) ... 8-9

CONSTITUTIONAL STATUTORY AND IOWA CODE OF PROFESSIONAL RESPONSIBILITY PROVISIONS

Fifth Amendment, United Constitution ... 4, 7, 13
Sixth Amendment, United States Constitution ... 1, 13, 17, 18, 19
Fourteenth Amendment, United States Constitution ... 1, 5, 7, 18, 22
Iowa Code of Professional Responsibility, E.C. 7-6 11
Iowa Code of Professional Responsibility, E.C. 7-26 11

Table Of Authorities— Continued

CASES: Page

OTHER AUTHORITIES

Bowman, "Standards of Conduct for Prosecution and Defense Personal — An Attorney's Viewpoint," 5 American Criminal Law Quarterly 28 (1966) 15

Freeman, "Professional Responsibility of the Criminal Defense Lawyer — The Three Hardest Questions," 64 Mich. L.Rev. 1469 (1966) 15

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law . . .

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense.

Fourteenth Amendment, United States Constitution

> No State . . . shall . . . deprive any person of life, liberty, or property without due process of law.

STATEMENT OF FACTS

Testimony at Petitioner's trial established that Emmanuel Whiteside and two companions, Terry Fowler and Derrick Doolin, went to the apartment of the victim, Calvin Love, and his girlfriend, Kathy Sauer, to obtain some marijuana. (App. p. 12). While there, an argument ensued about the marijuana and Love, who was lying on a bed, stated at least once that Sauer should get his "piece." (App. p. 12, 16-17, 36, 43, 49). At one point, Love got up, went to a different part of the room and then returned to the bed. (App. p. 16). Then, Love made a move to get off his bed moving toward Whiteside. (App. pp. 36-7, 42-3). A scuffle ensued and Love was fatally stabbed in the chest by Whiteside. (App. p. 42-5, 49-51). Sauer than gave Whiteside the marijuana and the trio left. (App. p. 15).

Testimony also showed that the room where the stabbing occurred was poorly lighted (App. pp. 34-5), that Love had a reputation for carrying weapons and that he was intoxicated the night he was killed. (App. p. 50). It was also established that Sauer and Love's family broke

the padlock off his apartment door and removed everything, including the carpet, the next morning. (App. pp. 8-9, 20-21). Police officers had conducted a "cursory search" of the premises after Love had been removed by ambulance attendants. (App. pp. 26-27).

A major point of controversy was whether Love reached under his pillow just prior to getting off the bed when he was stabbed. Kathy Sauer was not sure where Love's hands were. (App. pp. 21-22). Fowler stated Love did not place them under the pillow while Whiteside and Doolin stated that he did put his hands under the pillow prior to getting up. (App. pp. 38-39, 44-45, 49). Doolin, Fowler and Whiteside all testified that they thought Love had a gun but none stated that they saw one. (App. pp. 36, 45, 49-51).

At the hearing on Whiteside's Motion for a New Trial, Whiteside testified that when Attorney Robinson first visited him, he gave Robinson a written summary of the event that stated that he saw a gun in Love's hands. (Pet. App. A62-69)). He stated that after no gun was found, Robinson told him he would withdraw if he claimed he actually saw a gun. (Pet. App. A70-72). He agreed to testify that he only thought Love had a gun based on the threat and that he felt, based on Robinson's assurances, it would all work out. (Pet. App. A74-75).

Gary Robinson testified that, after reading Whiteside's statement, Whiteside stated that he did not really see the gun and that Whiteside acquiesced in the strategy of trying to "create" a gun. (Pet. App. A77-79). He stated that, when it became clear that a gun could not be found, Whiteside insisted on testifying he saw a gun. (Pet. App. A84-87). Robinson said he told Whiteside he could not condone perjury, that if he testified he saw a gun he would withdraw, inform the court of the perjury and be available

as a rebuttal witness. (Pet. App. A84-88). He stated that his threats caused Whiteside to testify as he did. (Pet. App. A89). Attorney Donna Paulsen testified to essentially the same things as Robinson.

The trial court, in overruling Defendant's Motion for New Trial, stated: "I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson." (App. 56-57).

Petitioner's recital of the procedural history of the case is adopted as essentially correct. (Brief, pp. 7-8).

SUMMARY OF ARGUMENT

A resolution of the problem of client perjury requires consideration of a number of values fundamental to the American system of jurisprudence. They include: (1) the value of truth seeking in the trial process; (2) the fundamental right to the assistance of counsel which requires loyalty, advocacy and confidentiality by the attorney; (3) the role of the jury in deciding what the truth is after skillfull advocacy and cross-examination by the parties' attorneys at trial.

Based on the values set out, it is necessary, as an initial matter, that counsel be convinced, at least, beyond a reasonable doubt that a defendant is going to commit perjury. Short of an explicit admission by the client, which counsel did not have here, the conclusion that perjury will be committed is never warranted.

However, as the Court of Appeals recognized, even if perjury was going to be committed in this case, trial counsel's response was not justified. Counsel experienced a conflict of interest which caused him to threaten to abandon his roles as zealous advocate and confidant of his client based on his desire to comply with what he believed his profession's ethical rules required. Counsel's threats to

withdraw from representation, inform the trial judge and testify against his client overstepped his role as set out above and left his client without the assistance of conflict-free counsel. Thus, the Court of Appeals correctly applied the presumption of prejudice in overturning the conviction. *See Holloway* v. *Arkansas*, 435 U.S. 475, 489, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 425, 437 (1978).

In addition, counsel's threats violated his client's rights to due process, a fair trial and the effective assistance of counsel by conditioning his client's constitutional right to counsel on restrictions counsel placed on his client's constitutional right to testify. This was especially effective in this case where the client had been told he would not be allowed further, substitute counsel.

This Court must affirm the well reasoned decision of the Court of Appeals to grant Emmanuel Whiteside habeas corpus relief.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT TRIAL COUNSEL'S THREATS TO WITHDRAW FROM RESPONDENT'S CASE, INFORM THE TRIAL JUDGE AND TESTIFY AGAINST RESPONDENT IF RESPONDENT GAVE TESTIMONY TRIAL COUNSEL BELIEVED TO BE PERJURED, EVIDENCED AN ACTUAL CONFLICT OF INTEREST AND INEFFECTIVE ASSISTANCE OF COUNSEL WHICH JUSTIFIED A PRESUMPTION OF PREJUDICE SUFFICIENT TO JUSTIFY HABEAS CORPUS RELIEF.

Petitioner premises his attack on the Court of Appeals' decision on what he characterizes as four key facts which assertedly vindicate trial counsel's actions. Briefly, they are: (1) Respondent did, in fact, intend to commit perjury;

(2) Neither the judge nor the jury was made aware of trial counsel's "admonitions"; (3) The only result was prevention of perjury and, thus, Respondent was not prejudiced; (4) Respondent did not complain regarding trial counsel's actions until after the verdict was rendered and, thus, his motives are suspect. (Pet's. Brief, pp. 11-13). However, a correct analysis of the facts involved and the values at stake in this litigation show that these four assertions are either irrelevant to the issues at hand or are unsupported by the record when read as a whole. A review of the constitutional and societal values implicated, as expressed through the United States Constitution and this Court's decisions, is the necessary starting point.

Petitioner begins his legal analysis by stating that the right to the effective assistance of counsel is based on the desirability of accurate verdicts at trial. (Pet's. Brief, p. 14). Though this is certainly a major goal of that right, Petitioner's constricted reading of that fundamental right and the conclusions he draws fail to even advance the interest he espouses.

First, it is well established that the due process right to counsel in criminal cases includes the right to the "guilding hand of counsel at every step in the proceeding against him." *Powell* v. *Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158, 170 (1932). This includes not only assistance at trial but also involves assistance in the decision whether to proceed to trial at all. *See North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S.Ct. 160, 167, 27 L.Ed.2d 162, 171 (1970); *McMann* v. *Richardson*, 397 U.S. 759, 769-71, 90 S.Ct. 1441, 1448-9, 25 L.Ed.2d 763, 772-3 (1970).[1] Further, and perhaps most important in the vast

[1] The large percentage of guilty pleas to criminal charges was recognized in *Brady* v. *United States*, 397 U.S. 742, 752, -90 S.Ct. 1463, 1471, 25 L.Ed.2d 747, 758-9, N. 10 (1970).

majority of cases, a defendant is entitled to the effective assistance of counsel at sentencing. *See Strickland* v. *Washington*, U.S. ____, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, (1984).

In order for counsel to competently perform this role, it is necessary that both client and counsel be able to rely on the attorney-client privilege. *See Upjohn* v. *United States*, 449 U.S. 383, 390, 101 S.Ct. 677, 683, 66 L.Ed.2d 584, 592 (1981). Because of this necessity, it is not surprising that Courts of Appeals have recognized that the privilege is part of the constitutional right to counsel. *See United States* v. *Brugman*, 655 F.2d 540, 546 (4 Cir. 1981); *Mastrian* v. *McManus*, 554 F.2d 813, 821 (8 Cir. 1977); *United States* v. *Rosner*, 485 F.2d 1213, 1224 (2 Cir. 1973). Moreover, it appears that this Court has, at least, implied that the attorney-client privilege has constitutional underpinnings.[2] *Weatherford* v. *Bursey*, 429 U.S. 545, 552-4, 97 S.Ct. 837, 842-3, 51 L.Ed.2d 30, 38-39 (1977); *Geders* v. *United States*, 425 U.S. 80, 88-89, 96 S.Ct. 1330, 1335, 47 L.Ed.2d 592, 599 (1976); *Hoffa* v. *United States*, 385 U.S. 293, 306-7, 87 S.Ct. 408, 416, 17 L.Ed.2d 374, 384-5 (1966).

Geders is especially noteworthy because, there, the Court held that the trial court erred in forbidding consultation between client and counsel during an overnight recess called during defendant's testimony. The Court reached this result despite claims that the truth seeking process might suffer as a result of this consultation.

---

[2] Even if only seen as a testimonial exclusionary rule, the attorney-client privilege is, ". . . a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Trammel* v. *United States*, 445 U.S. 40, 50, 100 S.Ct. 966, 912, 63 L.Ed.2d 186, 195 (1980).

Geders, 425 U.S. at 89-91, 96 S.Ct. at 1336-37, 47 L.Ed.2d at 599.

Geders is but one of a number of occasions where members of this Court have found that other interests must be served aside from the truth seeking process. This is especially apparent where freedom from compelled self-incrimination and the right to counsel are involved. For example, in *New Jersey* v. *Portash*, 440 U.S. 450, 458-60, 99 S.Ct. 1292, 1297, 59 L.Ed.2d 501, 509-10 (1979), the Court held that a criminal defendant could not be impeached with testimony given before a grand jury under grant of immunity. The Court distinguished cases such as *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971) and *Oregon* v. *Hass*, 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975), where the court had approved impeachment of a testifying defendant with statements obtained in violation of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), by pointing out that where the privilege against compelled self-incrimination, "in its most pristine form," is involved, the Court will not balance that protection against the "strong policy against countenancing perjury." Justice Powell, in his concurring opinion in Portash, (joined by Rehnquist, J.), 440 U.S. at 463, 99 S.Ct. at 1299, 59 L.Ed.2d at 512-13, underscored the subservience of the truth seeking function to this right:

> "The Court today recognizes, however, that the privilege against self-incrimination protects against more than just the use of false or inaccurate statements against a criminal defendant. In addition, the Fifth Amendment, by virtue of its incorporation through the Fourteenth Amendment, prohibits a State from using compulsion to extract truthful information from a defendant, when that information is to be used later in obtaining the individual's conviction."

In *Brooks* v. *Tennessee*, 406 U.S. 605, 609-13, 92 S.Ct. 1891, 1893-5, 32 L.Ed.2d 358, 362-5 (1972), this Court invalidated a State statue which required a criminal defendant to testify as the first defense witness or not at all on both compelled self-incrimination and right to counsel grounds.[3] *Brooks* is important because not only does it explicity recognize that these rights are of greater importance than the value of truth seeking,[4] it also points out that, ". . . our adversary system reposes judgment of the credibility of all witnesses in the jury." *Brooks*, 406 U.S. at 611-12, 92 S.Ct. at 1894-5, 32 L.Ed.2d at 363.

The fundamental role of the jury as the ultimate fact-finder in the American criminal justice system is completely ignored in Petitioner's analysis. Yet, the issue presented cannot be decided without consideration of, ". . ., the essential feature of a jury . . . in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or inno-

---

[3] Justice Stewart only joined the majority in Part II of the opnion, (due process right to counsel). *Brooks*, 406 U.S. at 613, 92 St.Ct. at 1895, 32 L.Ed.2d at 364.

[4] The role of defense counsel in the trial process was best explained by Justices White, Harlan and Stewart in their partial concurrences in *United States* v. *Wade*, 388 U.S. 218, 256-7, 87 S.Ct. 1926, 1947-8, 18 L.Ed.2d 1149, 1174 (1967):

> But defense has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case.

cence." *Williams* v. *Florida*, 399 U.S. 78, 100, 90 S.Ct. 1893, 1906, 26 L.Ed.2d 446, 460 (1970).

Simply put, our system of jurisprudence requires that prosecutors conscientiously and independently perform their roles of enforcing the laws and convicting the guilty. Prosecutors have received judicial protection in the performance of those duties. *Imbler* v. *Pachtman*, 424 U.S. 409, 424-7, 96 S.Ct. 984, 992-3 47 L.Ed.2d 128, 140-1 (1976). An important determination in the grant of that protection is that, ". . . it is very difficult if not impossible for attorneys to be absolutely certain of the objective truth or falsity of the testimony which they present." *Imbler*, 424 U.S. at 440, 96 S.Ct. at 999, 47 L.Ed.2d at 149, (concurring opinion of White, J.).[5] Defense counsel's role is to represent the client zealously[6] and "marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant." *Argersinger* v. *Hamlin*, 407 U.S. 25, 46, 92 S.Ct. 2006, 2017, 32 L.Ed.2d 530, 543 (1972), (concurring opinion of Powell, J.). A meaningful right to trial by jury depends on this. *Id.* It is the jury's function to decide who is telling the truth after the parties have presented their witnesses, with guidance of counsel, and subjected them to the skilled cross-examination of their adversary's attorney. *Jackson* v. *Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979); *Hoffa* v. *United States*, 385 U.S. at 311, 87 S.Ct. at 418, 172 Ed.2d at 387; *Glasser* v. *United States*, 315 U.S. 60, 77, 62 S.Ct. 457, 468, 86 L.Ed. 680, 703 (1942). *See Pointer* v. *Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13

---

[5] Imbler clearly recognizes that it is up to the jury, not the attorneys, to resolve which witnesses are telling the truth. *Imbler*, 424 U.S. at 426, 96 S.Ct. at 993, 47 L.Ed. 2d at 141.

[6] See *Maness* v. *Meyers*, 419 U.S. 449, 466-7, 95 S.Ct. 584, 595, 42 L.Ed.2d 574, 588 (1975).

L.Ed.2d 923, 926 (1965).[7] There is simply no need for defense counsel to ". . .appear (to the Defendant) as but another arm of the Government that has proceeded against him." *Baldwin* v. *New York*, 399 U.S. 66, 72, 90 S.Ct. 1886, 1890, 26 L.Ed.2d 437, 442 (1970).

As will be seen below, when the interest in truth seeking is considered with the constitutional right to counsel and the role of the jury as the ultimate factfinder, there can be no other conclusion than that trial counsel's actions in this case were unjustified and the Court of Appeals was correct in granting Respondent habeas corpus relief.

A. Even Assuming Respondent Was Going To Commit Perjury, Trial Counsel's Actions Were Not Warranted.

Petitioner makes much of the contention that this Court must accept the fact that Respondent was going to perjure himself and, as a result, trial counsel's response to this problem was constitutionally acceptable. Respondent does not concede that *Summner* v. *Mata*, 449 U.S. 449 U.S. 539, 544-5, 101 S.Ct. 764, 767, 66 L.Ed.2d 722, 729-30 (1980) dictates that this finding is "fairly supported by the record." This is true because, first, whether counsel had the requisite level of knowledge to conclude that a client is going to commit perjury is, at least, a mixed question of law or fact to which the presumption of correctness does not apply. *Butler* v. *United States*, 414 A.2d 844, 849 (C.A.D.C. 1980); See *Cuyler* v. *Sullivan*, 446 U.S. 335, 342, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333, (1980).[8]

---

[7] Juror's ability to perform this task was explicity recognized in *Duncan* v. *Louisiana*, 391 U.S. 145, 156-7, 88 S.Ct. 1444, 1451-2, 20 L.Ed.2d 491, 499-501 (1968).

[8] This would be especially true if, as Petitioner argues, a client intent on perjury waives his or her right to counsel. (Pet's Brief, p. 39). See *Brewer* v. *Williams*, 430 U.S. 387, 403-4, 97 S.Ct. 1232, 1242, 51 L.Ed.2d 424, 439 (1977).

Second, the claim that Whiteside was going to perjure himself is not fairly supported in the record based on the fact that Whiteside initially indicated to counsel that a gun was present, (App. p. 55), and merely acquiesced in counsel's strategic decisions that the weapon's presence was irrevelant until shortly before trial. (Pet. App. pp. 77-9, 84-87). Mere inconsistencies in a client's confidential statements to counsel do not justify a conclusion that perjury is to be committed. *Butler*, 414 A.2d at 849-50, citing *Johnson* v. *United States*, 404 A.2d 162, 164 (C.A.D.C. 1979). See *United States ex rel Wilcox* v. *Johnson*, 555 F.2d 115, 121 (3 Cir. 1977). Any uncertainty as to which version is accurate must be resolved in favor of the client and submitted to the factfinder. E.C. 7-6 and 7-26 of the Iowa Code of Professional Responsibility for Lawyers. *See Imbler*, 424 U.S. at 427, 96 S.Ct. at 993, 47 L.Ed.2d at 141.[9] Uncertainty is readily apparent based on the fact that trial counsel's investigation, aimed at "creating" a gun, (Pet. App. A77-79), did not begin until a month after the event, long after the victim's apartment had been cleared out. (Pet. App. A80, App. pp. 8-9). Thus, this Court is not bound to accept the conclusion that Respondent was going to perjure himself.

However, as the Court of Appeals stated:

> For the purposes of our analysis, we presume that appellant would have testified falsely. We recognize, of course, that the criminal defendants' privilege to testify in their own defense does not include the right to commit perjury. See *Harris* v. *New York*, 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1 (1971).

---

[9] It would be incongruous for the Court to allow counsel to disbelieve his or her client on a less than beyond a reasonable doubt standard when the factfinder must apply that standard to the defendant's case. *In re Winship*, 397 U.S. 358, 363 90 S.Ct. 1068, 1072 25 L.Ed.2d 368, 375 (1970).

> However, the fact that appellant would have committed perjury does not mean that appellant has waived his right to a fair trial, due process or effective assistance of counsel.

Whiteside v. *Scurr*, 744 F.2d at 1328, citing *Lowery* v. *Cardwell*, 575 F.2d 727, 730 (9 Cir. 1978). The Court's assertion that a perjury determined client does not forfeit the right to the effective assistance of counsel is supported by this Court's decisions in *New Jersey* v. *Portash*, 440 U.S. 450, 99 S.Ct. 1292 59 L.Ed.2d 501 (1979) and *Harris* v. *New York*, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971). In neither case was counsel chastised for allowing the defendant to present testimony that was more obviously perjured than that Respondent wished to give here. Portash had given conflicting testimony under oath, after a grant of immunity. *Portash*, 440 U.S. at 451-3, 99 S.Ct. at 1293, 59 L.Ed.2d at 505-6. Harris had given a voluntary, reliable statement to police. *Harris*, 401 U.S. at 224, 91 S.Ct. at 645, 28 L.Ed.2d at 4.

Further, Petitioner's assertion that a perjury determined client who refused to buckle under his attorney's threats has executed a Faretta-style waiver of counsel is simply not supported by that or any other of this Court's cases. (Pet's. Brief p. 39). This is especially true here where Respondent was never warned and questioned regarding the consequences of acting *pro se*. *Faretta* v. *California*, 422 U.S. 806, 835-6, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562, 581-2 (1975). Moreover, a "knowing, voluntary and intelligent" waiver of that right was not forthcoming because Respondent gave into trial counsel's wishes based, in part, on his desire not to lose the assistance of counsel. *Infra.*, pp.

Thus, assuming Petitioner was going to commit perjury, trial counsel's actions were not justified.

B. The Fact That Trial Counsel's Threats Were Not Disclosed To The Trial Court Or The Jury Did Not Limit Their Prejudicial Impact On Respondent's Right To Counsel.

Next, Petitioner contends that, because trial counsel's "admonitions" and his suspicion of perjury were not communicated to the trial judge or the jury, the trial process was not tainted. (Pet.'s Brief, p. 12). Petitioner appears to be contending that because Respondent did not call trial counsel's bluff and expose himself to the threatened consequences of his desired testimony, his rights were in no way harmed.

Initially, it should be noted that the Court of Appeals' preceived no difference, for Constitutional purposes, between counsel's threats and what the result would have been had counsel been forced to carry through on them. *Whiteside*, 744 F.2d at 1331. This is consistent with this Court's cases which have not required criminal defendants to suffer the consequences of unconstitutional restraints on their Fifth and Sixth Amendment rights in order to merit relief. *See New Jersey* v. *Portash*, 440 U.S. 450, 455-6, 99 S.Ct. 1292, 1295, 59 L.Ed.2d 501, 507-8 (1979); *Brooks* v. *Tennessee*, 406 U.S. 605, 611, 92 S.Ct. 1891, 1894, 32 L.Ed.2d 358, 363, N.6 (1972); *Ferguson* v. *Georgia*, 365 U.S. 570, 600-1, 81 s.Ct. 756, 772-3, 5 L.Ed.2d 783, 801 (1961), (concurring opinions.)

Moreover, it is incongruous to say that it is permissible to threaten to do an act which is impermissible to actually do. That is, a threat may be as persuasive as the act threatened. *See Miranda* v. *Arizona*, 384 U.S. 436, 448, 86 S.Ct. 1602, 1614, 16 L.Ed.2d 694-709 (1966).

Thus, the fact that trial counsel's belief in Respondent's planned perjury was not disclosed to the factfinder adds

nothing to Petitioner's argument because that was exactly the prohibited act trial counsel threatened to do.

Further, it is clear that, despite Petitioner's claims to the contrary, trial counsel's threats were not proper. Petitioner spends a significant portion of his brief discussing what an attorney may do when confronted with a perjury determined criminal defendant. (Pet.'s Brief, pp. 33).[10] As Petitioner correctly points out, having the defendant testify in a narrative fashion to his or her version of the events without counsel assisting in formulating or arguing that version to the jury has many flaws. Prominent among these is that it signals to the jury the lawyer's disbelief of the client's testimony. *See Johns* v. *Smythe*, 176 F. Supp. 949, 953 (E.D.Va. 1959).

Further, forcing a defendant to testify in narrative fashion, without the assistance of counsel, has been found by this Court to be a deprivation of the right of counsel. *Ferguson* v. *Georgia*, 365 U.S. 570, 596, 81 S.Ct. 756, 770, 5 L.Ed.2d 783, 798-9 (1961). Likewise, depriving the defense of closing argument violates the right to counsel. *Herring* v. *New York*, 442 U.S. 853, 862, 95 S.Ct. 2550, 2555, 45 L.Ed.2d 593, 600 (1975). *State* v. *Hendren*, 311 N.W.2d 61, 63 (Iowa 1981).

Petitioner contends that it is proper for a trial attorney in this situation to threaten to withdraw and inform the trial court of the nature of his or her suspicions. (Pet's. Brief, p. 30, 33-4).

---

[10] Petitioner's suggestion that rules governing counsel's response to client perjury are best left to the States, (Pet's. Brief, p. 30), is perhaps unwise because, as noted in *Upjohn*, 449 U.S. at 393, 101 S.Ct. at 684, 66 L.Ed.2d at 593, predictability is essential to the effectiveness of the attorney-client privilege. "An uncertain privilege, or one which . . . results in widely varying applications by the Courts is little better than no privilege at all." *Id.*

The most obvious flaw in this "solution" is that an attorney cannot threaten a client with withdrawal, or any other abandonment of their relationship of trust, in order to exercise control over a decision that is the client's to make. *Downton* v. *Perini*, 511 F.Supp. 258, 267-8 (N.D. Ohio 1981). *See Jones* v. *Barnes*, ___ U.S. ___, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983).

Next, all trial counsel's withdrawal accomplishes is that the problem is passed onto another attorney who the defendant may only give the most recent (perjured) version of the case to and, thus, be allowed to testify to that version. *See Newcomb* v. *State*, 651 P.2d 1176, 1181-3, N. 5 (Alk. App. 1982). Freedman, "Professional Responsibility of the Criminal Defense Lawyer — The Three Hardest Questions", 64 Mich. L. Rev. 1469, 1476. This "solution" in no way contributes to the fact-finding integrity of the court system upon which Petitioner bases his defense of trial counsel's actions.[11] In short, the remedy does not justify the problem.

---

[11] Petitioner does not address the issue of what counsel does if the trial court denies the motion to withdraw. It has been suggested that, in light of the total unacceptability of forcing the defendant to testify by narrative without supporting argument by counsel, counsel could then proceed to let the defendant testify as he or she wished because, by alerting the trial judge, counsel has, at least, fulfilled his or her obligation to the court. *See Bowman*, "Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpont," 5 American Criminal Law Quarterly 28, 30 (1966).

The withdraw and disclose remedy, thus, appears to recognize that trial counsel has a value in his or her personal autonomy; a rather bizarre notion considering Petitioner's claim that a criminal defendant has no such entitlement. (Pet's. Brief, p. 33), citing *Morris* v. *Slappy*, 461 U.S. 1, 13, 14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610, 621 (1983). *See United States* v. *Roberts*, 20 M.J. 689, 693 (A.C.M.R. 1985).

Even more important, however, is the fact that even if this Court were to approve of the withdraw and inform solution to the problem presented, Petitioner cannot prevail based on trial counsel's threat to "impeach" Respondent based on their confidential conversations. (Pet. App. A85). Despite Petitioner's protestations, none of the dissenting members of the Court of Appeals disagreed with the fact that trial counsel did, in fact, threaten to testify against Respondent; the most obvious meaning of trial counsel's words. But, even if counsel only meant to cross-examine Respondent, he would still be disclosing confidential information to the factfinder and communcating his disbelief of his client's testimony; the exact harm that the court's who have addressed this problem have all sought to avoid.[12] *Roberts*, 20 M.J. at 691; *Whiteside*, 750 F.2d at 714; *Butler*, 414 A2d at 852, 854; *Lowery*, 575 F.2d at 730; *Wilcox*, 555 F.2d at 122. Counsel's actions were especially flawed because no record was made as to whether he tried less severe ways to persuade Respondent, e.g. possible perjury prosecution, in order to get him to testify to what trial counsel believed the truth was.

Thus, it is clear that trial counsel did violate his relationship of confidence and trust with his client. His

---

[12] Any suggestion by Petitioner, (Pet's. Brief, p. 43), or amicus parties, (ABA.p. 15), that an attorney could withdraw prior to trial and serve as a rebuttal witness at trial, and, thus, avoid a "musical chairs" in front of the jury, only begs the question because: (a) new counsel would be reduced to a "figurehead" as a prior attorney calls the client a liar based on confidential disclosures; (b) Petitioner's characterization of the "admonition" makes it certain that any impeachment would have taken place at the current trial; (c) as the ABA notes, this case does not raise the question of the extent of counsel's ability to disclose the perjury "after he has withdrawn as counsel." (ABA, p. 15 N.3).

threats were truly a violation of Respondent's right to the effective assistance of counsel.

C. The Court Of Appeals Properly Applied The Presumption Of Prejudice For Conflict Of Interest Cases.

Petitioner's next claim is that no prejudice was sustained by Respondent as a result of trial counsel's actions. The argument is twofold. First, Petitioner contends that the Court of Appeals erred in applying the presumption of prejudice for conflict of interest cases. *Whiteside*, 744 F.2d at 1330. (Pet's. Brief, pp. 19-23). Second, Petitioner avers that Respondent could not meet the actual prejudice test for ineffective assistance of counsel cases set out in *Strickland* v. *Washington*, ___ U.S. ___, ___, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984). (Petitioner's Brief, p. 23). A proper analysis of conflict of interest caselaw demonstrates that the Court of Appeals was correct.

"The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client." *Von Moltke* v. *Gillies*, 332 U.S. 708, 725, 68 S.Ct. 316, 324, 92 L.Ed. 309, 321 (1948), citing *Glasser* v. *United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 465, 86 L.Ed. 680, 699 (1942). "Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision." *Van Moltke*, 332 U.S. at 725-6, 68 S.Ct. at 324, 92 L.Ed. at 322. *See Strickland*, 104 S.Ct. at 2063-5, 80 L.Ed.2d at 674-6.

Clearly, Respondent did not have an attorney devoted solely to the interests of his client and, thus, the Court of Appeals correctly applied the presumption of prejudice for conflict of interest cases. *Whiteside*, 744 F.2d at 1330.

The correct analysis for a deprivation of counsel claim based on conflict of interest is best set out by the remand court in *United States ex. rel. Sullivan* v. *Cuyler*, 553 F. Supp. 1236. 1241 (E.D.Pa. 1982):

> In his report, the Magistrate ably traced the evolution of the standard enunciated in *Cuyler* v. *Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) and the division opinion which its ambiguous language has spawned in the courts of appeals. He reasoned that the Court requires a finding of actual conflict which causes the attorney to choose a course of action adverse to his client's interests without the necessity of showing that the lapse in representation affected the outcome of the trial. Thus, because he found that counsel labored under conflicting duties (i.e. — to present exculpatory evidence on Petitioner's behalf through the testimony of the co-defendant yet to protect the codefendant from possible self-incrimination), and that counsel chose the latter course of action adverse to Petitioner's best interest, he concluded that the attorney's performance was adversely affected within the meaning of Sullivan. He declined to accept Respondent's argument advanced herein since it is "merely an attempt to redefine the Sullivan standard in terms of prejudice." Findings and Recommendation at 45. I fully concur with this analysis and adopt it herein.

The Court explained:

> The danger in Sixth Amendment terms to be identified by the Sullivan analysis is the causative effect on the lawyer's judgment of the conflicting interests. When the division in loyalty directly affects the lawyer's judgment, representation is per se ineffective and counsel is in essence denied altogether. This is because the "right to counsel guaranteed by the Sixth and Fourteenth Amendments contemplates the service of an attorney devoted solely to the interests of his client". *United States ex rel. Hart* v.

> *Davenport*, 478 F.2d 203, 209 (3rd Cir. 1973). Thus, it is the impaired loyalty itself; not the degree of incompetence produced by the impairment which violates the spirit of the Sixth Amendment. This view is evinced by the distinction drawn between conflict ineffectiveness and incompetence ineffectiveness.

Cuyler, 553 F. Supp. at 1241-2

Thus, the task here is to identify the conflicting interests and whether counsel's actions were affected by that conflict.

As observed by the United States Court of Appeals for the District of Columbia Circuit in *United States* v. *Hurt*, 543 F.d 162, 166 (D.C. Cir. 1976);

> To be sure, most conflicts of interest seen in criminal litigation arise out of a lawyer's dual representation of codefendants, but the constitutional principle is not narrowly confined to instances of that type. The cases reflect the sensitivity of the judiciary to an obligation to apply the principle whenever counsel is so situated that the caliber of his services may be substantially diluted. Competition between the client's interests and counsel's own interests plainly threatens that result, and we have no doubt that the conflict corrupts the relationship when counsel's duty to his client calls for a course of action which concern for himself suggests that he avoid.

In Hurt, 543 F.2d at 167-8, divided loyalty was found where appellate counsel was facing a libel suit filed by trial counsel based on an appeallate claim of ineffectiveness of trial counsel. Prejudice was presumed despite the fact that Hurt could point to no shortcomings in appellate counsel's representation. *Hurt*, 543 F.2d at 168.

Other courts have likewise applied the presumption of prejudice where trial counsel's personal interests conflicted with his or her duty of loyalty to the client. *See Virgin Islands* v. *Zepp*, 748 F.2d 125, 135-39 (3 Cir. 1984),

(counsel as witness exculpating self and inculpating defendant); *United States ex. rel. Simon* v. *Murphy*, 349 F. Supp. 818, 823 (E.D.Pa. 1972), (contingent fee agreement based on outcome of verdict); *Commonwealth* v. *Duffy*, 394 A.2d 965, 967-8 (Pa. 1978), (possibility of criminal charges against counsel); *People* v. *Meyers*, 263 N.E.2d 81, 82-3 (Ill. 1970), (potential contingent fee on related civil case affected by length of defendant's incarceration).

In the present case, it cannot be disputed that trial counsel's loyalty was split between his desire to do what he believed was demanded by ethical rules and his client's right to effective advocacy of his defense. This caused counsel to choose the path dictated by his personal interests in complying with what he believed the ethical rules required. Under *Cuyler*, then, the actual conlict of interest is shown as well as the fact that it adversely affected counsel's performance as an advocate. Petitioner's attempt to claim no "lapse of advocacy" based on the alleged strategic soundness of trial counsel's "admonitions", (Pet's. Brief, pp. 22-3), is "merely an attempt to redefine the Sullivan standard in terms of prejudice." This is a tactic rejected by the District Court in that case. *Cuyler*, 553 F. Supp. at 1241.

In sum, Respondent has shown that the Court of Appeals correctly applied the presumption of prejudice to what is clearly a conflict of interest case.[13]

---

[13] Actual prejudice sufficient to undermine confidence in the verdict could be shown based on the importance of the actual existence of a weapon when one seeks to raise a claim of self defense to a murder charge. A successful defense of self-defense must be premised on four elements; the relevant one here whether petitioner had reasonable grounds for his belief that he was in imminent danger of death or great bodily injury. *State* v. *Haffa*, 246 Iowa 1275, 1289, 71 N.W. 2d 35, 43 (1955). It cannot be gainsaid that the reasonableness of one's

D. The Timing Of Respondent's Claims Is Of No Significance Under Three Circumstances.

Petitioner attacks the Court of Appeals's decision based on the fact that Respondent indicated his satisfaction with counsel at the close of trial and did not complain about the "admonitions" until after the verdict was reached. (Pet's. Brief, pp. 13, 45). This "fact" is completely irrelevant because, initially, sophisticated trial counsel is in a much better position to recognize a conflict of interest than a client. *Cuyler* v. *Sullivan*, 446 U.S. 335, 346-7, 100 S.Ct. 1708, 1717, 64 L.Ed.2d 333, 345-6 (1980). Next, Respondent was in no position to complain regarding trial counsel at that time because he had been previously told that ". . . your chances of getting another change of attorneys are about zero(?)." (Pet. App. A53). That is precisely why trial counsel's threats were so effective. Respondent did not wish to proceed pro se.

Clearly, the timing of Respondent's claim is of no relevance in this case.

---

belief as to whether imminent danger is present is greatly affected by whether a gun is actually seen or only believed to be present. Trial counsel recognized this distinction. (Pet. App. p. 87). Respondent's desired testimony on this issue was crucial because he was the only one directly faced by the victim at the time Love arose from the bed. Also, the dimness of the light in the room could well have resulted in Respondent being the only person who saw the gun. Knowledge of this factor, when combined with Love's statement that he wanted his "piece" and his reputation for carrying guns, could well have changed the jury's verdict in favor of self-defense. Moreover, that evidence may have compelled the jury to find differently on the element of malice aforethought, due to the provocation from the presence of a gun, and Respondent would only have been convicted of manslaughter, a crime carrying a lesser penalty. *State* v. *Millspaugh*, 257 N.W.2d 513, 516 (Iowa 1977).

In sum, it has been shown that, based on the constitutional and societal interests involved and the specific facts of this case, the majority of the Court of Appeals was correct in holding that trial counsel improperly abandoned his duty of loyalty to his client and that, because the abandonment was the direct result of a conflict of interest, the presumption of prejudice was properly applied. The opinion of the Court at Appeals must be affirmed.

II. RESPONDENT WAS DENIED A FAIR TRIAL, DUE PROCESS OF LAW AND THE EFFECTIVE ASSISTANCE OF COUNSEL BY TRIAL COUNSEL'S CONDITIONING FURTHER REPRESENTATION ON THE CONTENT OF RESPONDENT'S TESTIMONY.

There can be no dispute that trial counsel directly threatened to abandon his sole as Respondent's advocate if Repondent testified as he wished. (Pet. App. A85). The Court of Appeals correctly found that this impermissibility forced Respondent to choose between his constitutional rights to counsel and to testify. *Whiteside*, 744 F.2d at 1329-30, citing, *United States ex. rel. Wilcox* v. *Johnson*, 555 F.2d 115, 120-1 (3rd Cir. 1977).

Clearly, a defendant has a due process right to testify in his or her defense. It has been recognized by this Court in *Jones* v. *Barnes*, ___ U.S. ___, ___ 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987, 993 (1983); *Faretta* v. *California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562, 572, N. 15, (1975); *Brooks* v. *Tennessee*, 406 U.S. 605, 612, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358, 364 (1972). ("whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right."); *Harris* v. *New York*, 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1, 4 (1971); *In re Oliver*, 333 U.S. 257, 273, 68 S.Ct. 499, 507,8, 92 L. Ed. 682 694 (1948). At least four Courts of Appeals have recognized the right. *Whiteside*,

744 F.2d at 1329-30; *United States* v. *Bifield*, 702 F.2d 342, 349 (2 Cir.) cert. deu. 103 S.Ct. 2095 (1983); *Alicea* v. *Gagnon*, 675 F.2d 913, 923 (7 Cir. 1982); *Wilcox*, 555 F.2d at 118-19. Even the dissenters below did not challenge this basic premise. *Whiteside*, 750 F.2d at 718, (Fagg, J. dissenting from denial of rehearing).

Further, the right to testify does not protect a defendant from all consequences of testifying falsely. The Court of Appeal's opinion does not dispute this. Clearly, a defendant may be punished with a perjury charge or enhanced punishment if he or she lies while testifying. *United States* v. *Grayson*, 438 U.S. 41, 53-4, 98 S.Ct. 2610, 2617, 57 L.Ed.2d. 582 (1978). Further, a testifying defendant may be impeached by prior inconsistent statements made to police. *Harris*, 401 U.S. at 225-6, 91 S.Ct. at 645-6, 28 L.E.2d at 4/5. However, nothing in these cases suggests that a client determined to commit perjury waives his or her right to the assistance of counsel. *Whiteside*, 744 F.2d at 1328,

This Court has held in the past that it is a violation of due process for a defendant to be forced to sacrifice one constitutional right to enforce another. *Simmons* v. *United States*, 390 U.S. 377, 393-4, 88 S.Ct. 967, 976, 19 L.Ed.2d 1247, 1259 (1968). Clearly, counsel's threats put before Respondent an intolerable "Hobson's choice" which was especially effective because Respondent had been told he would not be allowed to seek another substitute counsel. (Pet. App. A53). On these facts, there was no voluntary waiver of conflict-free counsel. *Faretta*, 422 U.S. at 835-6, 95 S. Ct. at 2541 45 L.Ed. 2d at 581-2.

Thus, the Court of Appeals correctly held that Respondent's rights to due process, a fair trial and the effective assistance of counsel were violated by trial counsel's forcing Respondent to choose between the exercise of

two constitutional rights. The decision of the Court of Appeals must also be affirmed on this ground.

CONCLUSION

The Court of Appeals recognized the importance of the role of counsel as an advocate and confidant in the American system of jurisprudence. Thus, the Court correctly concluded that counsel's threats to move to withdraw from his client's case, inform the trial judge that Respondent was going to commit perjury and testify against him reflected on actual conflict of interest that adversely affected his representation. Thus, the Court correct applied the presumption of prejudice based on this deprivation of counsel and held that Respondent should be given a new trial. *See Cuyler* v. *Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)

Any allegation that Respondent's alleged intention to commit perjury constituted a knowing, intentional and voluntary waiver of the right to counsel is without support in either the caselaw or the facts herein. See Faretta v. *California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Further, the Court of Appeals correctly found that counsel's threats resulted in a deprivation of his right to the effective assistance of counsel, due process and a fair trial because counsel conditioned his continued representation on the content of Respondent's testimony. Thus, Respondent was forced to choose between his constitutional right to counsel and his constitutional right to testify; an unconscionable choice.

Thus, this Court should affirm to the judgment of the Court of Appeals granting Respondent a writ of habeas corpus,

Respectfully submitted,

Patrick Reilly Grady
(appointed by this court)
Public Defender's Office
214 First Street SW
Cedar Rapids, Iowa 52404-
Phone: 398-3690

Counsel for Respondent

CERTIFICATE OF SERVICE

I, Patrick R. Grady, a member in good standing of the bar of the Supreme Court of the United States, do hereby certify that on July 23, 1985, I caused a copy of Respondent's Brief in the case of Nix v. *Whiteside*, No. 84-1321, to be sent by first class mail, postage prepaid to: Mr. Brent R. Appel, Deputy Attorney General of Iowa, Hoover State Office Building, Second Floor, Des Moines, Iowa 50319.

/s/_____

Patrick R. Grady

AFFIDAVIT OF SERVICE

State of Iowa

County of Linn

I. Patrick R. Grady, a member in good standing of the bar of the Supreme Court of the United States, do hereby depose that on July 23, 1985, I caused an original and one copy of Respondent's Brief in the case of Nix v. *Whiteside*, No 84-1321 to be sent by first class mail, postage prepaid to: Clerk, United States Supreme Court, Washington, D.C. 20543.

/s/_____

Patrick R. Grady
214 First Street S.W.
Cedar Rapids, Iowa 52404
Phone: (319) 398-3690

Subscribed and sworn to before me by the said Patrick R. Grady on this 23rd day of July, 1985.

Julie A. Thompson
Notary Public

Supreme Court, U.S.
FILED
OCT 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

(10)

No. 84-1321

In The
Supreme Court of the United States
October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

THOMAS J. MILLER
Attorney General of Iowa
*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5166
THOMAS D. McGRANE
Assistant Attorney General

October 23, 1985
*Counsel of record

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

10 pp

TABLE OF CONTENTS

Page

ARGUMENT 2

I. THE IOWA SUPREME COURT'S DETERMINATION THAT COUNSEL HAD COMPELLING REASON TO BELIEVE THAT WHITESIDE INTENDED TO TESTIFY FALSELY IS NOT SUBJECT TO ATTACK IN THIS COURT 2

A. The Iowa Supreme Court's Determination Involves A Question Of Historical Fact Entitled To The Presumption Of Correctness Under 28 U.S.C. § 2254(d) 2

B. The Record Establishes Beyond A Reasonable Doubt That Whiteside Intended To Testify Falsely At Trial 3

II. RESPONDENT'S "NO HOLDS BARRED" APPROACH TO CRIMINAL DEFENSE WOULD DESTROY ORDERLY TRIALS IN THE NATION'S COURTROOMS 5

III. A CRIMINAL DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DOES NOT INCLUDE THE RIGHT TO REQUIRE HIS OR HER ATTORNEY TO ACTIVELY ASSIST IN THE PERPETRATION OF A FRAUD UPON THE COURT 6

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Cuyler v. Sullivan, 446 U.S. 335 (1980) 2

Geders v. United States, 425 U.S. 80 (1976) 7

Hill v. Nelson, 466 F.2d 1346 (9th Cir. 1972) 4

State v. Whiteside, 272 N.W.2d 468 (1978) 2, 3

Sumner v. Mata, 449 U.S. 539 (1980) 2

United States ex rel. Wilcox v. Johnson, 555 F.2d 115, 122 (3rd Cir. 1977) 3

Velleca v. Superintendent, 523 F.2d 1040 (1st Cir. 1975) 4

OTHER AUTHORITIES

28 U.S.C. § 2254(d) 2

No. 84-1321

In The
Supreme Court of the United States
October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY BRIEF

Petitioner Crispus Nix, Warden of the Iowa State Penitentiary, respectfully submits this Reply Brief on the merits in the above-captioned proceedings.

ARGUMENT

I. THE IOWA SUPREME COURT'S DETERMINATION THAT COUNSEL HAD COMPELLING REASON TO BELIEVE THAT WHITESIDE INTENDED TO TESTIFY FALSELY IS NOT SUBJECT TO ATTACK IN THIS COURT.

A. The Iowa Supreme Court's Determination Involves A Question Of Historical Fact Entitled To The Presumption Of Correctness Under 28 U.S.C. § 2254(d).

The Respondent contends whether Whiteside intended to commit perjury is a mixed question of law and fact not entitled to a presumption of correctness under *Sumner v. Mata*, 449 U.S. 539 (1980). *See* Respondent's Brief at 10. The narrow factual question, however, is not whether Whiteside intended to commit perjury, but whether Whiteside intended to testify falsely. *See State v. Whiteside*, 272 N.W.2d 468, 470-71 (1978) (Pet. App. at p. 37). The question whether Whiteside was planning to testify falsely does not involve "application of any legal principles to the historical facts of this case." *See Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980). It involves only a question of plain fact wholly without legal conclusions. The determination that Whiteside intended to testify falsely is entitled to a presumption of correctness if "fairly supported by the record." *Sumner v. Mata*, 449 U.S. at 544-5.

Whether the presumptively correct facts establish that Whiteside intended to commit perjury does raise a legal question. The Respondent has not contested the legal conclusion that under the facts as determined by the Iowa Supreme Court, the Respondent's proposed course of action would have been perjury under Iowa law. *See State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978) (Pet. App.

A38) (Canon 4 of the Iowa Code of Professional Responsibility, which allows a lawyer to advise the court of a client's intention to commit a crime, vindicates action taken by Whiteside's attorneys). In any case, whether the facts support the view that the Respondent proposed to commit perjury is a question of state law to be determined by the Iowa Supreme Court.

B. The Record Establishes Beyond A Reasonable Doubt That Whiteside Intended To Testify Falsely At Trial.

In addition to attacking the Court of Appeal's willingness to afford a presumption of correctness to the state court factual findings in this case, the Respondent also asserts that an attorney's ethical obligation to prevent perpetration of fraud upon the court does not arise unless the lawyer knows beyond a reasonable doubt that the client intends to testify falsely. *See* Respondent's Brief at 11 n.9. The prevailing view, however, is that an attorney should simply have a firm factual basis for the belief. *United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3rd Cir. 1977). A more stringent standard would encourage collateral proceedings when the attorney rather than the defendant would be on trial.

In any case, the Iowa Supreme Court's holding here is consistent with the Respondent's premise. It noted that an attorney should not decide what is true and what is not without "compelling" support, a standard at least as stringent as reasonable doubt. *State v. Whiteside*, 272 N.W.2d at 470-71 (Pet. App. A37). After canvassing the record, the court concluded that there was compelling support for the lawyer's conclusion that his client was proposing to testify falsely. *Id.*

The factual determination of the Iowa Supreme Court is entitled to a presumption of correctness and must be affirmed by a federal court if the finding is supported by substantial evidence. *See Velleca v. Superintendent*, 523 F.2d 1040, 1041-42 (1st Cir. 1975) (per curiam). *But see Hill v. Nelson*, 466 F.2d 1346, 1348 (9th Cir. 1972) (per curiam). Even if this court were inclined to conduct a de novo review of the Iowa Supreme Court's finding, however, the record plainly shows that Whiteside's lawyer knew beyond a reasonable doubt that his client was deliberately proposing to testify falsely.

First, Whiteside's belated claim that he actually saw a gun in the possession of Love is totally inconsistent with events on the night of the homicide. If Love actually had a weapon, he would have had little trouble ordering the intruders out of the apartment by simply pointing the weapon at the uninvited guests. Instead, Love arose from his bed and jumped toward Whiteside. (App. 14, 43) A person armed with a gun does not move toward an assailant whom he knows (App. 12) is armed with a knife, thereby unnecessarily exposing himself to the risk of being stabbed.

Second, Whiteside's claim was flatly contradicted by information uncovered by Robinson. Through his independent investigation, Robinson learned that none of the eyewitnesses to the homicide saw a gun in Love's hands. He further discovered that a police search of the apartment shortly after the killing—a search conducted with the specific intention of discovering weapons (Pet. App. A82)—did not uncover a gun. There simply was no gun. As a result, Robinson concluded that the only available defense would be to concede that no gun was present, but claim that the defendant nonetheless reasonably thought that Love was armed. (Pet. App. A78-82)

Third, Whiteside's own statements to counsel reveal an obvious intent to testify falsely. Whiteside repeatedly told his counsel that he did not actually see a gun, but only thought Love had a gun because of his reputation for violence. (Pet. App. A79) When his lawyers refused to cooperate in his scheme to testify that he actually saw a gun, Whiteside did not proclaim the truth of his assertion. Instead, he declared "in Howard Cook's case, there was a gun. If I don't say I saw a gun, I'm dead." (Pet. App. A85) While Whiteside did not use the term "perjury," he told his lawyer clearly and unmistakably that he proposed to testify falsely in order to avoid conviction.

In sum, the events of the evening, the results of Robinson's independent investigation, and the statements of Whiteside himself established beyond a reasonable doubt that Whiteside was proposing to testify falsely at trial.

II. RESPONDENT'S "NO HOLDS BARRED" APPROACH TO CRIMINAL DEFENSE WOULD DESTROY ORDERLY TRIALS IN THE NATION'S COURTROOMS.

The Repondent apparently believes that a conflict of interest is present whenever the allegiance of counsel is supposedly divided "between his desire to do what he believed was demanded by ethical rules and his client's right to effective advocacy of his defense." Respondent's Brief at 20. The Respondent thus implies that counsel should do anything to help his client's cause notwithstanding ethical rules to the contrary.

Under Respondent's framework, an attorney should organize a demonstration outside the courthouse, notwithstanding ethical restraints, if he or she thought such action

would advance his or her client's cause. Similarly, a lawyer might be required deliberately and unethically to provoke a mistrial in a case proceeding poorly from the defense point of view. Perhaps a lawyer would even be required to threaten jurors or seek to influence them improperly. The Respondent's "no holds barred" approach to criminal defense would transform orderly courtrooms into legal jungles where the knowledge and skill of defense counsel in the guerilla arts would be more important than traditional advocacy skills.

III. A CRIMINAL DEFENDANT'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL DOES NOT INCLUDE THE RIGHT TO REQUIRE HIS OR HER ATTORNEY TO ACTIVELY ASSIST IN THE PERPETRATION OF A FRAUD UPON THE COURT

The Respondent contends that a criminal defendant may force an attorney to call him or her to the stand, to elicit patently false testimony through direct examination, and to argue the false evidence to the jury. Respondent's Brief at 14. In short, Respondent believes the constitutional right to effective assistance of counsel encompasses the right to an unethical attorney when a criminal defendant thinks it is in his interest to present false evidence.

Such a rule would have a devastating impact on the administration of criminal justice. A rule that requires a lawyer to participate in the manufacture and presentation of false evidence would undermine notions of truthfulness and integrity that are essential to public confidence in the criminal justice system. It would make it difficult to depend on attorney self-policing that is critical to the operation of a system where daily judicial su-

pervision is impossible. In addition, a criminal justice system which allowed defendants to obtain the assistance of lawyers in cheating and lying would undercut notions of personal responsibility inherent in our notions of criminal justice.

As was noted by Justice Marshall in *Geders v. United States*, 425 U.S. 80, 93 (1976):

> . . . if our adversary system is to function according to design, we must assume that an attorney will observe his responsibility to the legal system as well as to his client.

If the Respondent prevails in this case, the assumption that attorneys will conduct themselves in a manner consistent with legal ethics will no longer be justified.

CONCLUSION

For all the above reasons, and the reasons previously expressed in the Petitioner's Brief on the Merits, it is respectfully submitted that the opinion and decision of the Court of Appeals in the above-captioned matter must be reversed.

Respectively submitted,

THOMAS J. MILLER
Attorney General of Iowa

*BRENT R. APPEL
Deputy Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164

THOMAS D. MCGRANE
Assistant Attorney General

Office - Supreme Court, U.S.
FILED
JUN 22 1985
ALEXANDER L. STEVAS
CLERK

(5)

NO. 84-1321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

V.

EMMANUEL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

JEAN FLEMING POWERS
Assistant Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

DAVID CRUMP
Professor of Law
South Texas College of Law

BEST AVAILABLE COPY

14 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

BRIEF OF AMICUS CURIAE 1

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE REASONING OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND OF THE IOWA SUPREME COURT REPRESENT BETTER RESOLUTIONS OF THE QUESTIONS AT ISSUE THAN THE OPINION BELOW 2

II. THE DECISION OF THE EIGHTH CIRCUIT WOULD INTERFERE UNDULY WITH THE AUTHORITY OF STATES TO PREVENT UNETHICAL PRACTICES, WOULD MAKE ENFORCEMENT OF REASONABLE STANDARDS SUCH AS THE ABA MODEL RULES IMPRACTICAL, WOULD DISQUALIFY COMPETENT COUNSEL FOR REASONABLE HANDLING OF COMMON ETHICAL QUESTIONS, AND WOULD PREVENT THE GIVING OF SOUND ADVICE TO CLIENTS MOST IN NEED OF IT 3

A. *The Decision of the Eighth Circuit Unnecessarily Interferes With Rights of States to Determine Ethical Standards for Attorneys Practicing in their Courts. It Would Prevent the Enforcement of the ABA Model Rules of Professional Conduct* 3

B. *The Decision of the Lower Court Opens the Door to a Claim of Conflict of Interest in*

any Case in Which an Attorney Must Make Difficult Ethical Decisions 6

C. The Lower Court's Decision is Potentially More Detrimental to Effective Assistance of Counsel than the Action Taken by the Defendant's Attorney 8

CONCLUSION 8

TABLE OF AUTHORITIES

CASES

Cuyler v. Sullivan, 446 U.S. 335 (1980) 6, 7
Harris v. New York, 401 U.S. 222 (1971) 4
State v. Whiteside, 272 N.W.2d 468 (Iowa 1978) 3
Strickland v. Washington, 104 S.Ct. 2052 (1984) 6
United States v. Cronic, 104 S.Ct. 2039 (1984) 6
United States v. Curtis, 742 F.2d 1070 (7th Cir. 1984) 2
Whiteside v. Scurr, 744 F.2d 1323 (8th Cir. 1984) 2, 5
Whiteside v. Scurr, 750 F.2d 713 (8th Cir. 1984) (order denying motion for rehearing en banc) 3

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. VI 6

OTHER AUTHORITIES

ABA Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function, Proposed Defense Function Standard 4-7.7(c) (2d ed. 1980) 7
Kutak, *A Commitment to Clients and the Law*, 68 A.B.A.J. 804 (1982) 5
MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1983) 3, 4
MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983) 4

NO. 84-1321

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,
Petitioner,

V.

EMMANUEL CHARLES WHITESIDE,
Respondent.

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm (as that term is defined in Internal Revenue regulations). Its goals include the preservation of a rational system of criminal justice. In pursuit of this goal, LFA has appeared as amicus curiae in this honorable Supreme Court, in the Courts of Appeals, in District Courts, and in the courts of the various states. LFA is located upon the campus of the South Texas College of Law in Houston, Texas. It shares activities and personnel with the law school. All litigation undertaken by LFA is approved by its Board of Trustees, the majority of whom are attorneys.

SUMMARY OF ARGUMENT

The Eighth Circuit's decision interferes with the authority of the States to define the difficult balance between unethical conduct and effective advocacy. The decision would prevent the enforcement of even carefully prepared, balanced standards,

such as the ABA Model Rules of Professional Conduct. At the same time, the lower court's "conflict of interest" reasoning would disqualify competent counsel in every case in which any potential difference arose, even if it were satisfactorily resolved and even though such "conflicts" are so common as to arise in virtually every criminal case. Finally, the Eighth Circuit's decision would prevent counsel from giving sound advice to clients most in need of it, concerning perjury or any of a myriad of other potentially inadvisable courses of conduct.

ARGUMENT

I. THE REASONING OF THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND OF THE IOWA SUPREME COURT REPRESENT BETTER RESOLUTIONS OF THE QUESTIONS AT ISSUE THAN THE OPINION BELOW.

In *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1985), the Seventh Circuit stated that since it seemed "apparent that [the defendant] would have testified perjuriously, counsel's refusal to put him on the witness stand cannot be said to have violated [his] constitutional rights." [1] In the present case, the Eighth Circuit assumed that the defendant would have testified falsely, but it held counsel "ineffective" for adopting a course of conduct that was less intrusive than that in *Curtis* and that fully protected the right of the client to testify. [2] The Seventh Circuit's reasoning and that of the Iowa Supreme Court, which commended counsel in this case for the "high[ly] ethical manner" in which he represented his client, are superior to the reasoning of the Eighth Circuit. [3]

---

1 742 F.2d at 1076.

2 Whiteside v. Scurr, 744 F.2d 1323, 1329 (8th Cir. 1984). The dissent in the denial of the motion for rehearing points out the incon-

II. THE DECISION OF THE EIGHTH CIRCUIT WOULD INTERFERE UNDULY WITH THE AUTHORITY OF STATES TO PREVENT UNETHICAL PRACTICES, WOULD MAKE ENFORCEMENT OF REASONABLE STANDARDS SUCH AS THE ABA MODEL RULES IMPRACTICAL, WOULD DISQUALIFY COMPETENT COUNSEL FOR REASONABLE HANDLING OF COMMON ETHICAL QUESTIONS, AND WOULD PREVENT THE GIVING OF SOUND ADVICE TO CLIENTS MOST IN NEED OF IT.

A. The decision of the Eighth Circuit unnecessarily interferes with rights of states to determine ethical standards for attorneys practicing in their courts. It would prevent the enforcement of the ABA Model Rules of Professional Conduct.

The decision below is in conflict with the Model Rules of Professional Conduct, even though the opinion includes those

---

gruity of the holding by quoting the following excerpts from the opinion:

> [W]e presume that appellant would have testified falsely.
>
> * * * *
>
> * * * Counsel threatened appellant that he would withdraw from the case, advise the state court trial judge of appellant's intention, and testify against him as rebuttal witness for the prosecution. Counsel's actions prevented appellant from testifying falsely. We hold that counsel's action deprived appellant of due process and effective assistance of counsel.
>
> * * * *
>
> Counsel's actions also impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony.

Whiteside v. Scurr, 750 F.2d 713, 714-15 (8th Cir. 1984), citing 744 F.2d at 1328, 1329.

3 State v. Whiteside, 272 N.W.2d 468, 471 (Iowa 1978).

Rules as an appendix. The Rules and Commentary expressly require an attorney to "persuade the client to refrain from perjurious testimony." [4] Given the present decision, it would be impractical for a lawyer to "persuade" the client against perjury, since he would be likely to make himself ineffective, and violate the Constitution, by that action.

The Model Rules and Commentary further provide that a lawyer "shall not knowingly offer evidence" that is false and "may refuse to offer evidence that the lawyer reasonably believes is false," [5] exactly as the lawyer did in this case. These Rules would be extraordinarily difficult for real-world counsel to implement consistently with the decision below. The Rules and Commentary also recognize the need for the lawyer to "exercise control over the proof." [6] They follow the decisions of this honorable Supreme Court in stating that "an accused should not have a right to assistance of counsel in committing perjury." [7] The attorney in this case took very modest measures to address these concerns, and for those measures he has been labelled constitutionally "ineffective."

The Model Rules are the official draft of the American Bar Association expressing professional standards for attorneys. They are intended for adoption by States in the regulation of the legal profession. The present decision would make their adoption difficult for many States.

The Model Rules are further the product of lengthy and occasionally heated debate within the ABA concerning the ap-

---

4 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

5 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(4), (c) (1983).

6 MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1983).

7 Id. See Harris v. New York, 401 U.S. 222, 225 (1971).

propriate middle ground between two polarized viewpoints.[8] The late Robert Kutak, Chair of the ABA Committee on Professional Standards, wrote as follows in explaining and supporting the Model Rules:

> [W]e must reject any notion that the professional role should parallel the policeman's. We also must reject any notion that the professional role must, at times, be that of coconspirator. Between those two poles lies the proper role of the lawyer who must provide zealous representation of clients but remain within the bounds of law. [9]

The present decision presents substantial questions because it will frustrate efforts to achieve that middle ground so diligently sought by the American Bar Association. It would mean that every state adopting the ABA's Model Rules could not enforce provisions that are essential to the balance.

The Eighth Circuit purported to defer to the authority of the state supreme court "on all questions of state law."[10] But the decision leaves the states with few options in determining ethical standards for attorneys in the area of client perjury. It is the states that have responsibility for enforcing the criminal law against perjury committed in their courts, as well as regulating the legal profession—a responsibility they have had since before the founding of the Republic. This issue is not one that lends itself to clear, black-and-white resolution, but rather involves policy decisions, and the present decision prevents the States from making those policy decisions.

---

8 The Court below cites a few of the numerous articles written on this topic even before the discussion draft of the Model Rules was released.

9 Kutak, A Commitment to Clients and the Law, 68 A.B.A.J. 804, 805 (1982).

10 744 F.2d at 1330.

This Court has recently pointed out that "of course, the Sixth Amendment does not require that counsel do what is impossible or unethical." *United States v. Cronic*, 104 S.Ct. 2039, 2045 n. 19 (1984). In drafting the Sixth Amendment, the framers of the Constitution could not have intended to give rights to defendants that require unethical behavior by counsel. At a time when public confidence in both the ethical standards of attorneys and the ability of the criminal justice system to deal effectively with crime is especially low, the States must not be put into a situation in which they must choose, as apparently they must in this case, between legal and ethical conduct of the attorneys who are officers of their courts and the ability to obtain binding criminal convictions.

B. The decision of the lower court opens the door to a claim of conflict of interest in any case in which an attorney must make difficult ethical decisions

The lower court's conclusion that this case presents an actual conflict of interest, which is necessary for finding a presumption of inadequate assistance of counsel,[11] is erroneous. None of the actions indicated by the attorney, which might have resulted in a situation of actual conflict had the client persisted in his stated intent to commit perjury, were ever taken, and, thus, the "conflict" never developed. All the attorney actually did was advise his client of the *potential* conflict in the event of actual perjury, much as an attorney advises clients of the *potential* for conflict in a multiple representation situation.[12] In the

---

11 Strickland v. Washington, 104 S.Ct. 2052, 2067 (1984), citing Cuyler v. Sullivan, 446 U.S. 335, 348, 350 (1980).

12 In this case, the potential for conflict evaporated when the defendant decided to tell the truth. The Supreme Court cases cited by the Eighth Circuit regarding the conflict, Strickland v. Washington, 104 S.Ct. 2052 (1984), and Cuyler v. Sullivan, 446 U.S. 335 (1980), refer to conflicts in the situation of multiple clients in a single case, a situation which arises only in a specific type of case, and for which there are reasonable guidelines.

latter case, this Court has pointed out that "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance,"[13] and "a reviewing court cannot presume that the possibility for conflict has resulted in ineffective assistance of counsel."[14]

In fact, one could easily conclude that a greater conflict would be involved in following the ABA Proposed Defense Function Standards, which the Eighth Circuit apparently approves. Those standards suggest a course of conduct including discreetly making a record of the fact that the defendant is taking the stand against the advice of counsel, refraining from direct examination "in the conventional manner" and refraining from arguing or relying upon the false testimony.[15] Surely, trying to walk this fine line between protecting oneself in a continuing representation while trying to adequately represent the client and not reveal the perjury presents a much greater conflict than dealing with the problem in the privacy of the attorney-client relationship, and putting it behind.

The interest of an attorney in protecting himself against charges of criminal or unethical behavior is always present, and his actions are always influenced in some manner by such considerations. In this sense, the attorney is always a "potential adversary" of his client. To the extent that the attorney in this case was put in a situation of "conflict," *every* attorney temporarily facing such a dilemma, no matter how it is ultimately resolved, can be said to have exactly the same conflict of interest.

---

13 Cuyler v. Sullivan, 446 U.S. at 350.

14 Id. at 348.

15 ABA Project on Standards for Criminal Justice: The Prosecution Function and the Defense Function, Proposed Defense Function Standard 4-7.7(c) (2 ed. 1980), appended to 744 F.2d at 1331.

C. The lower court's decision is potentially more detrimental to effective assistance of counsel than the action taken by the defendant's attorney.

A client is not expected automatically to know what the consequences of his actions might be. The very basis for the right to counsel lies in the fact that the client generally will not have the knowledge necessary to make informed choices about his case without counsel. It would be anomolous indeed if an attorney could not advise his client regarding the legality, advisability, and possible consequences of such a serious action as that contemplated by the defendant herein for fear of thereby being found constitutionally "ineffective."

Additionally, the attorney's action in preventing the perjury was in the client's best interest, and not just a means of protecting his own interest, as the lower court suggests. Any attorney who would acquiesce in the commission of a new crime by his client, subject to another prosecution, is not serving the best interests of his client. Furthermore, given that the defense was based on a theory of self-defense, making the credibility of the defendant very important,[16] the attorney would have been remiss had he *not* made every effort to deter the defendant in his perjurious intent, which would have been extremely disadvantageous before the jury. Thus the decision below would hurt the very class of persons the court of appeals sought to protect, namely persons accused of crime and needing effective advice of counsel.

CONCLUSION

The Court should reverse the decision of the Eighth Circuit and hold that the representation at issue was not ineffective.

---

16 There were eyewitnesses whose testimony could have been used to impeach the defendant. The attorney was able to observe the defendant and make his own professional evaluation of how the contemplated testimony might be received by the fact finder.

Respectfully submitted,

Jean Fleming Powers
Assistant Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

David Crump
Professor of Law
South Texas College of Law

Office-Supreme Court, U.S.
FILED
JUN 24 1985
ALEXANDER L. STEVAS,
CLERK

(6)

No. 84-1321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

v.

EMMANUEL CHARLES WHITESIDE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JOHN C. SHEPHERD*
President, American Bar Association
MICHAEL FRANCK
GEORGE KUHLMAN
*Counsel of Record
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5000

Merrill/Chicago • 372-2800

BEST AVAILABLE COPY

51

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS, IOWA CODE PROVISIONS AND AMERICAN BAR ASSOCIATION MODEL RULES AND STANDARDS INVOLVED	vi
THE INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT OF THE AMICUS CURIAE	3
I. A LAWYER'S ETHICAL DUTY TO AVOID THE KNOWING USE OF FALSE TESTIMONY BY A CLIENT DOES NOT OFFEND THE SIXTH AMENDMENT GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL	3
A. A Lawyer Who Learns That a Client Intends to Offer False Testimony Must Attempt to Dissuade the Client from Doing So	3
B. A Lawyer Who is Unable to Dissuade a Client from Offering False Testimony Must Seek to Withdraw	4
C. A Lawyer Whose Motion to Withdraw is Denied Must Not Participate in Deceiving the Court	5
1. A Lawyer May Not Actively Assist in the Presentation of False Testimony	5
2. A Lawyer May Not Permit a Client to Testify Falsely in Narrative Form	8
D. If a Client Persists in Testifying Falsely and the Lawyer Has Been Unable to Withdraw, the Lawyer Must Disclose the Perjury to the Trial Court	10

PAGE

II. A LAWYER MUST ADVISE A CLIENT OF THE CONSEQUENCES OF THE CLIENT'S PROPOSED CONDUCT AND THIS DUTY IS FULLY CONSISTENT WITH THE SIXTH AMENDMENT GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL .. 14

CONCLUSION 16

APPENDIX A-1

TABLE OF AUTHORITIES

Cases:

	PAGES
Arizona v. *Washington*, 434 U.S. 497 (1978)	4
Committee on Professional Ethics and Conduct of Iowa State Bar Association v. *Crary*, 245 N.W.2d 298 (Iowa 1976)	10
Cooks v. *United States*, 461 F.2d 530 (5th Cir. 1972)	4
Dodd v. *The Florida Bar*, 118 So. 2d 17 (Fla. 1960)	9
Evans v. *State*, 477 S.W.2d 94 (Mo. 1972)	3, 14
Harris v. *New York*, 401 U.S. 222 (1971)	7, 8, 12, 13
In re Selser, 15 N.J. 393, 105 A.2d 395 (1954)	6
Johnson v. *United States*, 360 F.2d 844 (D.C. Cir. 1966)	7
Lowery v. *Cardwell*, 575 F.2d 727 (9th Cir. 1978)	9
McKissick v. *United States*, 379 F.2d 754 (5th Cir. 1967), *aff'd after remand*, 398 F.2d 342 (5th Cir. 1968)	9, 10
Miranda v. *Arizona*, 384 U.S. 436 (1966)	7, 13
State v. *Phelps*, 24 Or. App. 329, 545 P.2d 901 (1976)	6
Strickland v. *Washington*, — U.S. — , 104 S. Ct. 2052 (1984)	11, 12, 13
United States v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976)	11
United States v. *Cortellesso*, 663 F.2d 361 (1st Cir. 1981)	15
United States v. *Curtis*, 742 F.2d 1070 (7th Cir. 1984)	9
United States v. *Havens*, 446 U.S. 620 (1980)	7, 11, 13

PAGES

Whiteside v. *Scurr*, 744 F.2d 1323, *reh'g denied*, 750 F.2d 713 (8th Cir. 1984) 9

Constitutional Provisions:

U.S. Const. amend. IV 13
U.S. Const. amend. V 13
U.S. Const. amend. VI 4

Other Authorities:

Canons of Professional Ethics
Canon 37 (1937) 5

Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966) 5

Iowa Code of Professional Responsibility for Lawyers (1980)
DR 2-110 . . . . . 4, 14
EC 2-34 4
DR 4-101 5
DR 5-102 15
DR 7-102 . . . . . 7, 9, 10, 14
EC 7-5 3
EC 7-8 3

McCormick on Evidence §95 (E. Cleary 3d ed. 1984) 6

Model Rules of Professional Conduct (1983)
Preamble 12
Rule 1.2 . . . . . 3, 7, 10, 14
Rule 1.4 3
Rule 1.6 6
Rule 1.6 Comment 11

PAGES

Rule 1.16 ..... 4, 14

Rule 3.3 ..... 6, 7, 9, 10, 14

Rule 3.3 Comment 3, 4, 7, 9, 10, 11, 14

Rule 3.7 15

Restatement (Second) of Agency §381 (1957) 3, 14

Standards for Criminal Justice, Proposed Standard 4-7.7 (1979) 8, 9

Standards Relating to the Prosecution Function and the Defense Function §7.7 (Approved Draft 1971) 8

CONSTITUTIONAL PROVISIONS, IOWA CODE PROVISIONS AND AMERICAN BAR ASSOCIATION MODEL RULES AND STANDARDS INVOLVED

Fourth Amendment, United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .

Fifth Amendment, United States Constitution

No person shall be . . . compelled in any criminal case to be a witness against himself . . . .

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence.

Iowa Code of Professional Responsibility for Lawyers (1980)

DR 2-110 Withdrawal from Employment.

(A) In general.

(1) If permission for withdrawal from employment is required by the rules of a tribunal, a lawyer shall not withdraw from employment in a proceeding before that tribunal without its permission.

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

(3) A lawyer who withdraws from employment shall refund promptly any part of a fee paid in advance that has not been earned.

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

(1) He knows or it is obvious that his client is bringing the legal action, conducting the defense, or asserting a position in the litigation, or is otherwise having steps taken for him, merely for the purpose of harassing or maliciously injuring any person.

(2) He knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule.

(3) His mental or physical condition renders it unreasonably difficult for him to carry out the employment effectively.

(4) He is discharged by his client.

(C) Permissive withdrawal.

If DR 2-110(B) is not applicable, a lawyer may not request permission to withdraw in matters pending before a tribunal, and may not withdraw in other matters, unless such request or such withdrawal is because:

(1) His client:

(a) Insists upon presenting a claim or defense that is not warranted under existing law and cannot be supported by good faith argument for an extension, modification, or reversal of existing law.

(b) Personally seeks to pursue an illegal course of conduct.

(c) Insists that the lawyer pursue a course of conduct that is illegal or that is prohibited under the Disciplinary Rules.

(d) By other conduct renders it unreasonably difficult for the lawyer to carry out his employment effectively.

(e) Insists, in a matter not pending before a tribunal, that the lawyer engage in conduct that is contrary to the judgment and advice of the lawyer but not prohibited under the Disciplinary Rules.

(f) Deliberately disregards an agreement or obligation to the lawyer as to expenses or fees.

(2) His continued employment is likely to result in a violation of a Disciplinary Rule.

(3) His inability to work with co-counsel indicates that the best interests of the client likely will be served by withdrawal.

(4) His mental or physical condition renders it difficult for him to carry out the employment effectively.

(5) His client knowingly and freely assents to termination of his employment.

(6) He believes in good faith, in a proceeding pending before a tribunal, that the tribunal will find the existence of other good cause for withdrawal.

EC 2-34

A decision by a lawyer to withdraw should be made only on the basis of compelling circumstances, and in a matter pending before a tribunal he must comply with the rules of the tribunal regarding withdrawal. A lawyer should not withdraw without considering carefully and endeavoring to minimize the possible adverse effect on the rights of his client and the possibility of prejudice to his client as a result of his withdrawal. Even when he justifiably withdraws, a lawyer should protect the welfare of his client by giving due notice of his withdrawal, suggesting employment of other counsel, delivering to the client all papers and property to which the client is entitled, co-operating with counsel subsequently

employed, and otherwise endeavoring to minimize the possibility of harm. Further, he should refund to the client any compensation not earned during the employment.

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of

a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

DR 5-102 Withdrawal as Counsel When the Lawyer Becomes a Witness.

. . .

(B) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that he or a lawyer in his firm may be called as a witness other than on behalf of his client, he may continue the representation until it is apparent that his testimony is or may be prejudicial to his client.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

. . .

(4) Knowingly use perjured testimony or false evidence.

. . .

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

. . .

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal in all circumstances except when barred from doing so by section 622.10, The Code. If he is barred from doing so by section 622.10, he shall immediately withdraw from the repre-

sentation of the client unless the client fully discloses the fraud to the person or tribunal.

. . .

EC 7-5

A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision. He may continue in the representation of his client even though his client has elected to pursue a course of conduct contrary to the advice of the lawyer so long as he does not thereby knowingly assist the client to engage in illegal conduct or to take a frivolous legal position. A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor.

EC 7-8

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of nonlegal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that

is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

Model Rules of Professional Conduct (1983)

The Preamble and the Comment to Rules 1.6 and 3.3 are set forth in the Appendix.

RULE 1.2 Scope of Representation

. . .

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

. . .

RULE 1.4 Communication

. . .

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

RULE 1.16 Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

(1) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(2) the client has used the lawyer's services to perpetrate a crime or fraud;

(3) the client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

(c) When ordered to so do by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

RULE 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance

requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

RULE 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9

Standards for Criminal Justice, Proposed Standard 4-7.7 (1979)

Testimony by the defendant

. . .

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises immediately preceding trial or during the trial and the defendant insists upon testifying perjuriously in his or her own behalf, it is unprofessional conduct for the lawyer to lend aid to the perjury or use the perjured testimony. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate man-

ner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

Editorial Note

This proposed standard was approved by the ABA Standing Committee on Association Standards for Criminal Justice but was withdrawn prior to submission of this chapter to the ABA House of Delegates. Instead, the question of what should be done in situations dealt with by the standard has been deferred until the ABA Special Commission on Evaluation of Professional Standards reports its final recommendations.

Standards Relating to the Prosecution Function and the Defense Function §7.7 (Approved Draft 1971)

Testimony by the defendant

. . .

(c) If withdrawal from the case is not feasible or is not permitted by the court, or if the situation arises during the trial and the defendant insists upon testifying falsely in his own behalf, the lawyer may not lend his aid to the perjury. Before the defendant takes the stand in these circumstances, the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer must confine his examination to identifying the

witness as the defendant and permitting him to make his statement to the trier or the triers of the facts; the lawyer may not engage in direct examination of the defendant as a witness in the conventional manner and may not later argue the defendant's known false version of facts to the jury as worthy of belief and he may not recite or rely upon the false testimony in his closing argument.

No. 84-1321

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

v.

EMMANUEL CHARLES WHITESIDE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

THE INTEREST OF THE AMICUS CURIAE

For more than three-quarters of a century, the American Bar Association has played a leadership role in the development of ethical standards for the legal profession. In 1908 the Association promulgated the Canons of Ethics; in 1969, the Model Code of Professional Responsibility; and in 1983, the Model Rules of Professional Conduct. The Canons and the Code were almost universally adopted by the states to govern the conduct of the lawyers they licensed. The Rules have already been adopted by two states and some federal courts. They have been recommended for adoption by the practicing bar in thirteen other states. They are under active consideration in almost every other jurisdiction.

At issue before this Court is the constitutionality of the provisions of the Iowa Code of Professional Responsibility for Lawyers that govern the duties of the lawyer who learns that a client intends to offer perjured testimony at trial. The Iowa

Code is substantially identical in this respect to the ABA Model Code and to the parallel provisions of the ABA Model Rules. These ethical standards attempt to balance the lawyer's duty of loyalty to the client, which includes the duty to maintain the confidentiality of the client's communications, with the lawyer's duty to be candid with the court and to not allow himself or herself to be used as an instrument of deception.

The resolution of this issue by this Court is likely to affect the ethical standards governing the conduct of lawyers throughout the United States. The American Bar Association, therefore, has a vital interest in the outcome.

SUMMARY OF ARGUMENT

The American Bar Association appears as *amicus curiae* to address the question of what measures a lawyer is ethically obligated to take upon learning that a client intends to offer false testimony, and to show that the measures so taken do not violate the client's right to the effective assistance of counsel as guaranteed to him or her by the Sixth Amendment of the United States Constitution.

This *amicus* also argues that a lawyer whose client intends to offer false testimony is prohibited by ethical standards from participating in the presentation of that testimony, and that such a prohibition does not deprive a client of the Sixth Amendment's guarantee of effective assistance of counsel.

ARGUMENT OF THE AMICUS CURIAE

I. A LAWYER'S ETHICAL DUTY TO AVOID THE KNOWING USE OF FALSE TESTIMONY BY A CLIENT DOES NOT OFFEND THE SIXTH AMENDMENT GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL.

A. A Lawyer Who Learns That a Client Intends to Offer False Testimony Must Attempt to Dissuade the Client from Doing So.

Established ethical standards reject the notion that a client can require a lawyer to orchestrate false testimony. They call upon a lawyer who discovers that a client intends to offer perjured testimony to attempt to persuade the client to refrain from doing so. Iowa Code of Professional Responsibility for Lawyers ECs 7-5, 7-8 (1980) [hereinafter cited as Iowa Code]; Model Rules of Professional Conduct Rules 1.2(d), 1.4(b), Rule 3.3 Comment (1983) [hereinafter cited as Model Rules].

In so counseling the client, the lawyer is obligated to warn of the undesirable consequences that may follow upon the client's perjured testimony. *Id.* These include the possibility that the falsehood will become known to the prosecution, which may rely thereon to undermine the defendant's credibility and/or to initiate a separate prosecution against the defendant for perjury. The obligation to fully inform the client also requires the lawyer to disclose the effects upon the representation itself which flow from the client's determination to testify falsely. These are discussed below.

By fully advising the client, the lawyer complies not only with applicable ethical standards but also with his or her common law fiduciary duty as an agent. Iowa Code, *supra*, ECs 7-5, 7-8; Model Rules, *supra*, Rules 1.2(d), 1.4(b), Rule 3.3 Comment; Restatement (Second) of Agency §381 (1957); *see Evans* v. *State*, 477 S.W.2d 94 (Mo. 1972). This duty of the lawyer — to make sure that the client is sufficiently

informed of the foreseeable consequences of contemplated behavior in order to make an informed decision — is fully consistent with the Sixth Amendment guarantee of effective assistance of counsel. U.S. Const. amend. VI; *see Cooks* v. *United States*, 461 F.2d 530 (5th Cir. 1972).

B. A Lawyer Who is Unable to Dissuade a Client from Offering False Testimony Must Seek to Withdraw.

The lawyer who learns that a client insists upon testifying falsely must initially attempt to withdraw without advising the trial judge of the reason for the request. Iowa Code, *supra* p. 3, DR 2-110, EC 2-34; Model Rules, *supra* p. 3, Rule 1.16, Rule 3.3 Comment. The unsupported motion to withdraw may, of course, not be granted. The closer the request is made to the trial, the less likely it is to be granted.

Once jeopardy has attached, the trial judge may be even more reluctant to allow a lawyer to withdraw without a statement on the record disclosing the basis for the request. Since the withdrawal of the defendant's counsel is likely to necessitate a mistrial, there must be a demonstration of "manifest necessity" to avoid a double jeopardy bar to a retrial. *Arizona* v. *Washington*, 434 U.S. 497 (1978). The trial judge may conclude that "manifest necessity" cannot be demonstrated if the record does not fully disclose the basis for permitting the lawyer to withdraw.

Nevertheless, the lawyer is obligated to make an attempt to reconcile the duty to avoid any personal participation in deceiving the court with the duty to make as little disclosure of client communications as possible. The lawyer does so by moving to withdraw without disclosing the client's determination to give perjured testimony.

C. A Lawyer Whose Motion to Withdraw is Denied Must Not Participate in Deceiving the Court.

1. A Lawyer May Not Actively Assist in the Presentation of False Testimony.

It has been suggested that if the lawyer's motion to withdraw without disclosing the basis for the request is denied, the lawyer has no alternative other than to assist the client in the presentation of the false testimony both on direct examination and in the summation. That approach is rationalized by the argument that if the defendant insists upon taking the stand to testify falsely any attempt by the lawyer to treat or present that testimony differently from any other would constitute a penalty imposed upon the client for the confidential communications from which the lawyer learned that the testimony was false. It is further argued that since the sanctity of confidential communication is essential to proper representation, any action adverse to the client as a result of information communicated in confidence may not be tolerated. Thus, it is said, "the obligation of confidentiality, in the context of our adversary system, apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury." Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469, 1477-78 (1966).

This argument relies upon the incorrect premise that the confidentiality of client communications is and historically has been regarded in the law as inviolate. To the contrary, the standards of lawyer conduct as well as the law of privilege have long recognized exceptions to the duty of confidentiality. *See, e.g.*, the Canon excluding a client's announced intention to commit a crime from the lawyer's duty of confidentiality, Canons of Professional Ethics Canon 37 (1937); the Iowa Rule permitting a lawyer to reveal a client's intention to commit a crime and the information necessary to prevent it, Iowa Code, *supra* p. 3, DR 4-101(C)(3); and, more narrowly, the Model Rule provision permitting disclosure of

information where reasonably necessary to prevent a client from committing a criminal act likely to result in imminent death or substantial bodily injury, Model Rules, *supra* p. 3, Rule 1.6(b)(1). Also, Model Rule 3.3 requires disclosure as a remedial measure in the client perjury situation when all other remedial measures have failed, specifying that other Rules governing confidentiality are thereby superseded, *id.* Rule 3.3(a)(4), (b). The "crime/fraud" exception to the attorney-client privilege likewise recognizes that the duty of confidentiality in communications between lawyer and client does not extend to prospective criminal or fraudulent conduct by the client. *In re Selser*, 15 N.J. 393, 105 A.2d 395 (1954); *State* v. *Phelps*, 24 Or. App. 329, 332, 545 P.2d 901, 904 (1976); *McCormick on Evidence* §95 (E. Cleary 3d ed. 1984).

The argument that a lawyer ought to assist the client in orchestrating the perjury has in fact been strongly disapproved:

> A lawyer . . . advocates but does not *identify* with his client. The alter ego or "mouthpiece" school of thought, which is happily a minute fraction of the legal profession, would carry this perverted notion to the point of complete identification of lawyer with client, *i.e.*, the lawyer as an extension of the accused himself with a community of interest, motivation and goals, bound to engage in falsehood and chicane at the command of the client. These concepts have long been rejected . . . and find no acceptance among honorable members of the bar.
>
> The lawyer . . . should be . . . a professional advocate with a highly important but none the less limited function, *i.e.*, *limited and circumscribed by the rules of the system and the ethics of the profession.* At the trial stage his duty is to put the prosecution to its proof, to test the case against the accused, to insist that the procedural safeguards be followed

> *and to put forward evidence which is valid, relevant and helpful to his client.*

Johnson v. *United States*, 360 F.2d 844, 846 (D.C. Cir. 1966) (Burger, J., concurring) (emphasis supplied). *See also* Iowa Code, *supra* p. 3, DR 7-102(A)(4), (7); Model Rules, *supra* p. 3, Rules 1.2(d), 3.3(a)(4), which prohibit a lawyer's knowing use of perjured testimony and counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. These ethical standards are fully consistent with the United States Constitution.[1]

The Constitution does not guarantee a criminal defendant a right to testify falsely. *Harris* v. *New York*, 401 U.S. 222, 225 (1971). "[W]hen defendants testify, they must testify truthfully or suffer the consequences." *United States* v. *Havens*, 446 U.S. 620, 626 (1980). In *Harris*, this Court held that a criminal defendant who commits perjury is subject to impeachment on the basis of prior inconsistent statements, even if those statements were obtained in violation of the procedural safeguards mandated by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). In so holding, the Court concluded that a criminal defendant's Fifth Amendment rights under *Miranda* "cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 U.S. at 226.

It follows that the Sixth Amendment guarantee of effective assistance of counsel may not be perverted into an instrument with which to compel a lawyer, a member of an

---

1. The Comment to Model Rule 3.3 cautions lawyers that certain cases (some of which are cited *infra* p. 9) have held that the Sixth Amendment guarantee of effective assistance of counsel conflicts with the duties that the Rule would impose. This acknowledges the reality that in some jurisdictions lawyers are bound to adhere to those rulings until and unless they are reversed. The policy-making body of the *amicus curiae* does not agree with those court decisions and by this brief urges the Court to find that the lawyer's duty to preserve the integrity of the administration of justice by refusing to participate in the client's false testimony is not inconsistent with the guarantee of effective assistance of counsel.

honorable profession sworn to uphold the law and to further the administration of justice, to aid and abet one determined to violate the testimonial oath and illegally to deceive the tribunal into finding as true that which he or she knows is false. To conclude otherwise is to assert that the Sixth Amendment would force a lawyer to assist a client to accomplish that which this Court has held the Constitution does not protect—perjured testimony. *Harris* v. *New York*, 401 U.S. 222 (1971).

2. A Lawyer May Not Permit a Client to Testify Falsely in Narrative Form.

Another suggested resolution of the problem facing the lawyer whose client is determined to testify falsely is for the lawyer to allow the client to testify in narrative form rather than by question and answer. Proposed Defense Standard 4-7.7 of the American Bar Association's Standing Committee on Association Standards for Criminal Justice provided that:

> As to matters for which it is believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

Standards for Criminal Justice, Proposed Standard 4-7.7 (1979).[2]

---

2. This proposed standard, had it been adopted, would have closely followed Standard 7.7 of the Standards Relating to the Prosecution Function and the Defense Function (Approved Draft 1971) which had been adopted earlier by the American Bar Association's House of Delegates. However, when the Association's Criminal Justice Section proposed a

(Continued on next page)

While several lower court decisions, including that here under review, have suggested that the lawyer whose client insists upon testifying falsely may ask the client to continue to testify in narrative fashion, (*see, e.g., Whiteside* v. *Scurr*, 744 F.2d 1323, *reh'g denied*, 750 F.2d 713 (8th Cir. 1984); *Lowery* v. *Cardwell*, 575 F.2d 727 (9th Cir. 1978)), other lower courts have expressed approval of a lawyer's refusal to in any way participate in offering testimony known to be false. *United States* v. *Curtis*, 742 F.2d 1070 (7th Cir. 1984); *McKissick* v. *United States*, 379 F.2d 754 (5th Cir. 1967), *aff'd after remand*, 398 F.2d 342 (5th Cir. 1968); *Dodd* v. *The Florida Bar*, 118 So. 2d 17, 19 (Fla. 1960).

The ethical standards of the profession adopt the latter view. Thus they prohibit the knowing use by the lawyer of perjured testimony. Iowa Code, *supra* p. 3, DR 7-102(A)(4); Model Rules, *supra* p. 3, Rule 3.3(a)(4), Rule 3.3 Comment. They reject the narrative testimony resolution for several reasons.

That approach undermines the lawyer's duty not to assist, even passively, in the client's attempt to perpetrate a fraud and mislead the court. *See* Iowa Code, *supra* p. 3, DR 7-102(A)(7); Model Rules, *supra* p. 3, Rule 1.2(d), Rule 3.3 Comment. Yet, at the same time, it subjects the client to an implicit disclosure of confidential communications, at least to the trial judge and the prosecutor. Moreover, the narrative approach would be an unsatisfactory resolution of the

---

(Continued from previous page)

revised set of standards to the House of Delegates in 1979, this standard supporting the narrative testimony approach to the client perjury problem was withdrawn from consideration. *See* Editorial Note, Standards for Criminal Justice Proposed Standard 4-7.7 (1979). At the same time, the American Bar Association's Commission on Evaluation of Professional Standards was drafting the Model Rules of Professional Conduct. Model Rule 3.3 and its Comment, which were adopted by the House of Delegates in 1983, provide a different resolution of the client perjury problem. The Comment to Model Rule 3.3 expresses disagreement with the approach embodied in the former standard. Model Rules, *supra* p. 3, Rule 3.3, Rule 3.3 Comment.

dilemma even from the client's standpoint because it would permit the lawyer, unilaterally and without review, to make a decision that would deny the client the benefit of a trial conducted in the usual manner in which all exculpatory evidence is argued to the jury.

D. If a Client Persists in Testifying Falsely and the Lawyer Has Been Unable to Withdraw, the Lawyer Must Disclose the Perjury to the Trial Court.

When the client insists upon testifying falsely and the lawyer cannot acquiesce in presenting the evidence he or she knows is false and cannot withdraw without disclosing the basis for the request, this *amicus* submits that there remains only one possible course of action. The lawyer who for those reasons cannot proceed further on his or her own authority has a duty to disclose the client's perjury to the trial court and to seek the court's guidance. Model Rules, *supra* p. 3, Rule 3.3(a)(4), (b); Iowa Code, *supra* p. 3, DR 7-102(B)(1); *Committee on Professional Ethics and Conduct of Iowa State Bar Association* v. *Crary*, 245 N.W.2d 298 (Iowa 1976). Model Rule 3.3 (Candor Toward the Tribunal) places a duty of disclosure upon the lawyer as a "reasonable remedial measure," even if compliance requires disclosure of confidential information. Disclosure of the perjury is resorted to only when other measures have failed to remedy the situation. Model Rules, *supra* p. 3, Rule 3.3 Comment. The Iowa Code, when viewed in light of *Crary*, similarly places a duty of disclosure upon the lawyer. In *Crary*, the court observed that a client, in committing perjury, acts outside the attorney-client relationship, and that his or her confidences in relation to the perjury are therefore not entitled to the protection which otherwise could be expected. The Fifth Circuit, in holding that double jeopardy did not bar a retrial of a criminal defendant after a mistrial was declared based on the defendant's perjury, stated that defense counsel had a "professional, ethical and public duty to report [the perjury]." *McKissick* v. *United States*, 379 F.2d 754, 761 (5th Cir. 1967), *aff'd after remand*, 398 F.2d 342 (5th Cir. 1968).

The lawyer should discharge this duty of disclosure to the trial court by revealing only those facts necessary to obtain appropriate instructions. Model Rules, *supra* p. 3, Rule 1.6 Comment. The lawyer thereby limits the breach of client confidentiality to that absolutely necessary to fulfill the need justifying disclosure.

Once this limited disclosure has been made, "[i]t is for the court then to determine what should be done." *Id.* Rule 3.3 Comment. A judicial determination in these circumstances is far more compatible with the Sixth Amendment guarantee of effective assistance of counsel than the lawyer's unilateral conclusion that the client should be denied a defense conducted in the traditional manner. *Cf. United States* v. *Carrigan*, 543 F.2d 1053 (2d Cir. 1976) (the determination of whether a lawyer's conflicting interests deprived his client of effective assistance properly belongs to the judge, rather than to the lawyer).

This method of remedying a client's unlawful conduct by seeking the guidance of the public official in charge of the trial restores the integrity of the adversarial process so that the trial may proceed fairly. The accomplishment of this objective is intended by the Sixth Amendment guarantee of effective assistance of counsel as made clear in *Strickland* v. *Washington*, — U.S. —, 104 S. Ct. 2052 (1984). There the Court said that the purpose of the constitutional requirement of effective assistance is "to ensure a fair trial . . . " *Id.* at 2064. The Court went on to say that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.*

The proper functioning of the adversarial process is premised upon, among other factors, truthful testimony. *See United States* v. *Havens*, 446 U.S. 620 (1980). As this Court reaffirmed in *Havens*, "truth is a fundamental goal of our legal system." 446 U.S. at 626. This concept is supported and

enforced by statutes uniformly adopted across the country which make perjury a crime.

The distortion which results from the use of false testimony at trial leads to an increased likelihood of an unfair result being obtained. The most reasonable action the lawyer can take under these circumstances is the disclosure of the perjury, because it insures that the outcome will instead be determined on the basis of truthful testimony. This disclosure, which is limited to the trial court and not made in the presence of the jury, enables the trial court to determine what should be done so that the trial proceeds fairly.

The disclosure of perjury as required by the profession's ethical standards fulfills the lawyer's responsibility as an officer of the court. *See* Model Rules, *supra* p. 3, Preamble. It would be an anomaly to view a lawyer's disclosure in these circumstances as "undermin[ing] the proper functioning of the adversarial process." *Strickland*, 104 S.Ct. at 2064. In fact, by restoring the element of fairness to the trial, disclosure not only does not offend, but is in fact consistent with, the purpose underlying the constitutional requirement of effective assistance articulated by this Court in *Strickland*.

In *Strickland* this Court set forth a two-pronged test for claims of ineffective assistance. The first prong of that test requires a demonstration that the defense lawyer's performance was deficient. 104 S.Ct. at 2064. The standard used is whether the lawyer's performance is that of "reasonably effective assistance." *Id.* Further, judicial scrutiny of this performance "must be highly deferential." *Id.* at 2065. In light of the fact that there is no constitutional right to testify falsely, *Harris* v. *New York*, 401 U.S. 222 (1971), the lawyer's disclosure of the client's perjury to the trial court cannot constitute ineffective assistance of counsel. Thus the first prong of the *Strickland* test for ineffective assistance of counsel is not satisfied by the conduct of a lawyer who, when confronted with a client determined to commit perjury, acts according to established ethical rules for the profession as described above.

The second prong of the *Strickland* test is a showing of prejudice: that the defense lawyer's acts deprived the client of a fair trial. 104 S.Ct. at 2064. A defense lawyer's disclosure of client perjury to the trial court for the purpose of seeking the court's guidance as to how to preserve the integrity of the trial when every other approach has failed does not deprive the client of any rights to which the client is entitled. To hold otherwise would create a constitutionally sanctioned right to the assistance of counsel to commit perjury. This would directly contravene the principles articulated by this Court in *Harris* and *Havens*. The second prong of the *Strickland* test is therefore likewise not satisfied.

This Court has not directly addressed a claim of denial of the Sixth Amendment guarantee of effective assistance of counsel in the context of a client's insistence upon committing perjury. The Court has addressed, however, related Fourth and Fifth Amendment claims in *United States* v. *Havens*, 446 U.S. 620 (1980) and *Harris* v. *New York*, 401 U.S. 222 (1971). U.S. Const. amend. IV, amend. V. In both cases, the Court held that the Constitution was not violated when certain adverse consequences befell a criminal defendant who testified falsely. In *Havens*, evidence obtained as a result of an unlawful search and seizure was permitted to be used to impeach a defendant's false testimony. In *Harris*, statements obtained in violation of the procedural safeguards required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), were also admissible for impeachment purposes. This Court rejected the notion that a defendant's constitutional rights could be "perverted into a license to use perjury by way of a defense," free from the risk of adverse consequences. *Havens*, 446 U.S. at 626; *Harris*, 401 U.S. at 226. This *amicus* urges the Court to hold, similarly, that a criminal defendant who commits perjury may not use the Sixth Amendment guarantee of effective assistance of counsel to secure an opportunity to testify falsely.

When all other measures have failed to remedy the situation, the purpose underlying the Sixth Amendment's guaran-

tee of effective assistance of counsel is best served by the lawyer's disclosure of the client's perjury to the trial court. Furthermore, such performance by the lawyer is not deficient according to the test established in *Strickland*.

II. A LAWYER MUST ADVISE A CLIENT OF THE CONSEQUENCES OF THE CLIENT'S PROPOSED CONDUCT AND THIS DUTY IS FULLY CONSISTENT WITH THE SIXTH AMENDMENT GUARANTEE OF EFFECTIVE ASSISTANCE OF COUNSEL.

A fundamental element of a lawyer's fiduciary responsibility to a client is the duty to apprise the client of the consequences that can reasonably be anticipated to follow upon any proposed approach to the representation. Restatement (Second) of Agency §381 (1957); *see Evans* v. *State*, 477 S.W.2d 94 (Mo. 1972). This is required to enable the client to make an informed decision concerning the alternatives available. The lawyer's discharge of the duty to so advise the defendant client in a criminal case must be recognized as an essential element of the effective assistance of counsel guaranteed by the Sixth Amendment.

Among the possible consequences of the client's conduct that the lawyer must disclose are those resulting from the legal and professional obligations to which the lawyer is subject. Those obligations include the lawyer's duty to seek to withdraw where continued representation would result in a violation of applicable ethical standards, Iowa Code, *supra* p. 3, DR 2-110(B)(2); Model Rules, *supra* p. 3, Rule 1.16(a)(1); the lawyer's duty not to assist the client in conduct that the lawyer knows is criminal or fraudulent, Iowa Code, *supra* p. 3, DR 7-102(A)(7); Model Rules, *supra* p. 3, Rule 1.2(d); and the lawyer's duty to disclose the client's false testimony if the client will not do so. Iowa Code, *supra* p. 3, DR 7-102(B)(1); Model Rules, *supra* p. 3, Rule 3.3(a)(4), (b), Rule 3.3 Comment.

In so advising a client, a lawyer must not deliberately mislead the client, however, even if the purpose is to persuade the client to abandon his or her determination to testify falsely. Thus, the lawyer could not properly suggest that if the client persists in giving false testimony, the lawyer will pursue courses of action that in fact are not available. For example, it is inconceivable that a lawyer would be permitted to testify about the client's perjury as a rebuttal witness for the prosecution while continuing to serve as the client's defense counsel. Iowa Code, *supra* p. 3, DR 5-102(B); Model Rules, *supra* p. 3, Rule 3.7(a); *United States* v. *Cortellesso* 663 F.2d 361 (1st Cir. 1981). Consequently it would be improper for the lawyer to suggest to the client that he or she would so testify while continuing to act as the client's counsel.[3]

In the instant case, the obligation to consult with the client required the lawyer to disclose to the client that the lawyer could not silently acquiesce in the client's intention to commit perjury, and that, if the client persisted, the lawyer would first have to move to withdraw without disclosing the basis for the request, and that if the motion was denied the lawyer would have to disclose the falsehood to the trial judge.

---

3. The Court need not reach the question, not presented in this case, whether and under what circumstances a lawyer may be called to testify after he has withdrawn as counsel.

CONCLUSION

Amicus Curiae American Bar Association respectfully urges that the Court expressly find that the ethical standards as described above governing the duty of a lawyer whose client intends to commit perjury do not violate the Sixth Amendment guarantee of effective assistance of counsel.

Respectfully submitted,

JOHN C. SHEPHERD,*
President, American Bar Association

MICHAEL FRANCK
GEORGE KUHLMAN

*Counsel of Record

APPENDIX

Model Rules of Professional Conduct (1983)

PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor and, to a limited extent, as a spokesperson for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.

In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving such conflicts. Within the framework of

these Rules many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.

RULE 1.6 COMMENT:

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such

information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized Disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the

duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the clients' confidences, except as otherwise provided in Rule 1.6. Neither this rule nor Rule 1.8(b)

nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, the lawyer may make inquiry within the organization as indicated in Rule 1.13(b).

Dispute Concerning Lawyer's Conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal or profes-

sional disciplinary proceeding, and can be based on a wrong allegedly committed by the lawyer against the client, or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by paragraph (b)(2) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures Otherwise Required or Authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See Rules 2.2, 2.3, 3.3 and 4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes Rule 1.6 is a matter of interpretation beyond the scope of these Rules, but a presumption should exist against such a supersession.

Former Client

The duty of confidentiality continues after the client-lawyer relationship has terminated.

RULE 3.3 COMMENT:

The advocate's task is to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client is qualified by the advocate's duty of candor to the tribunal. However, an advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.

Representations by a Lawyer

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also the Comment to Rule 8.4(b).

Misleading Legal Argument

Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer's duty when that persuasion fails. If the confrontation with the client occurs before trial, the law-

yer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer's effort to rectify the situation can increase the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer's questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with

the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

Constitutional Requirements

The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

Refusing to Offer Proof Believed to Be False

Generally speaking, a lawyer has authority to refuse to offer testimony or other proof that the lawyer believes is untrustworthy. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. In criminal cases, however, a lawyer may, in some jurisdictions, be denied this authority by constitutional requirements governing the right to counsel.

Ex Parte Proceedings

Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in an ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Supreme Court, U.S.
FILED
JUL 24 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1321

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CRISPUS NIX, WARDEN,
Petitioner,

v.

EMMANUEL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Michael L. Bender, Esq.
Bender & Treece, P.C.
1900 Grant Street
Suite 700
Denver, Colorado 80203
(303) 534-3015

Bruce M. Lyons, Esq.
Lyons & Sanders, P.C.
600 N.E. 3rd Avenue
Fort Lauderdale, Florida 33304
(305) 467-8700

(Counsel for Amicus Curiae)

Castillus Press Inc. – 1717 K Street NW, Washington DC – 223-1220

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the defense lawyer erroneously conclude that his client's prospective testimony was in part perjurious?

2. Did the defense lawyer, by threatening to withdraw, to disclose potential client perjury and to testify adversely against the client, create an irreconcilable conflict between himself and his client, forcing his client to limit his testimony, and thereby deprive his client of his Fifth, Sixth and Fourteenth Amendment rights to a fair trial, to testify on his own behalf and to have the effective assistance of counsel?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 3

INTEREST OF AMICUS 2

SUMMARY OF THE ARGUMENT 3

ARGUMENT 3

I. WHITESIDE'S LAWYER'S ACTS OF PREMATURELY MISLABELLING HIS CLIENT'S TESTIMONY AS PERJURIOUS AND HIS MAKING MULTIPLE THREATS TO WITHDRAW, INFORM THE COURT OF THE DETAILS OF WHITESIDE'S POTENTIAL PERJURY AND TO TESTIFY AGAINST WHITESIDE CREATED AN IRRECONCILABLE CONFLICT OF INTEREST BETWEEN HIMSELF AND WHITESIDE WHICH DEPRIVED WHITESIDE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND THE RIGHT TO TESTIFY 5

A. The facts of this case do not establish a firm factual basis for the defense lawyer to conclude that Whiteside was going to commit perjury 5

B. Whiteside's lawyer's actions of labelling his client's proposed testimony as perjurious and his making multiple threats to withdraw, inform and testify against Whiteside created a conflict of interest impairing the accuracy of the fact finding process and shattering the attorney-client relationship, which violated Whiteside's right to effective assistance of counsel 13

Page

1. Requirements of due process of law and effective assistance of counsel dictate that the criminal defense lawyer perform the role of an advocate and not that of a judge of his own client 13

2. The conflict of interest between the client (Whiteside's right to convey his full state of mind to the jury as he remembered it) and the lawyer (counsel's fear of personal consequences unless he forfeited Whiteside's right to tell the jury his full state of mind) was real, clear and constitutionally impermissible 17

3. The conflict between client and laywer presumptively constitutes prejudice which denied Whiteside his right to effective assistance of counsel 19

4. In cases which pose the perjurious client problem it should be unconstitutional to require or allow the defense lawyer to forfeit his own client's fundamental right to testify 21

II. THIS COURT SHOULD GUIDE THE CRIMINAL DEFENSE ATTORNEY FACED WITH CLIENT PERJURY IN ORDER TO GIVE THE LAWYER THE RIGHT AND POWER TO COMPLY WITH THE LAW WITHOUT THE RISK OF HARMING THE CLIENT, INCURRING A MALPRACTICE SUIT OR A FINDING OF INCOMPETENCY 24

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: Page

Brooks v. Tennessee,
406 U.S. 605 (1972) 17

Butler v. United States,
404 A.2d 162 (D.C. 1979) 8, 16

Cf. State v. Lee,
142 Ariz. 210, 689 P.2d 153 (1984) 28

Coleman v. Alaska,
621 P.2d 869 (Alaska 1980), *cert. denied,* 454 U.S. 1090 (1981) .. 29

Commonwealth v. Wolfe,
301 Pa. Super. 187, 447 A.2d 305 (1982) 8

Cuyler v. Sullivan,
446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980) 20

Faretta v. California,
422 U.S. 806, 819 N.15 (1975) 17

Harris v. New York,
401 U.S. 222 (1971) 17, 22

In re Oliver,
333 U.S. 257 (1948) 17

Johnson v. Emerson,
L.R. 6 Ex. 329 (1871) 14

Johnson v. United States,
404 A.2d 162 (D.C. 1979) 7

Lowery v. Cardwell,
575 F.2d 727 (9th Cir. 1978) 16, 25, 28

Nix v. Whiteside 5

State v. Whiteside,
272 N.W. 2d 468 (Iowa 1978) 9, 10

Page

Strickland v. Washington,
466 U.S. ____, 104 S.Ct. 2052 (1984) 14, 19

Sumner v. Mata,
449 U.S. 539 (1981) 5

United States v. Curtis,
742 F.2d 1070 (7th Cir. 1984) 21, 22

United States v. Grayson,
438 U.S. 41 (1978) 22, 25

United States ex rel Wilcox v., Johnson,
555 F.2d 115 (3d Cir. 1977) 6, 7, 8, 15, 25

Wainwright v. Sykes,
433 U.S. 72 (1977) 25

Whiteside v. Scurr,
744 F.2d 1323 (8th Cir. 1984) ..... *passim*

Whiteside v. Scurr,
750 F.2d 713 (8th Cir. 1984) 9, 10, 27, 28

Constitution and Statutes:

Fifth Amendment, United States Constitution 24

Sixth Amendment, United States Constitution 13, 19, 24

Fourteenth Amendment, United States Constitution 24

United States Code, Title 28, Section 2254 5

Page

Other Authorities:

ABA Model Code of Professional Responsibility (1980):

Canon 7 ..... 5, 14
DR 7-102(A)(4) 14
EC 7-26 ..... 5, 14

ABA Model Rules of Professional Conduct (1983):

Rule 3.3 and Comment 5, 6, 13, 26

ABA Standards for Criminal Justice: The Defense Function:

Defense Function Standard 7.7 ..... 15, 25
Proposed Defense Function Standard 4-7.7 ..... 15, 25

ABA Standards for Criminal Justice:

The Prosecution Function Standard 3-5.8(b) 29

Comment, *Confidentiality and the Lawyer's Conflicting Duty*, 27 How. L.J. 329 (1984) 29

Freedman, *Lawyers' Ethics in an Adversary System* (1975) 28

Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966) 24

Rotunda, *The Notice of Withdrawal and the New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 Or. L. Rev. 455 (1984) 24

Vickrey, *Tell It Only to the Judge: Disclosure of Client Confidences Under the ABA Model Rules of Professional Conduct*, 60 N.D. L. Rev. 261 (1984) 29

Wolfram, *Client Perjury*, 50 So. Cal. L. Rev. 809 (1977) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1321

CRISPUS NIX, WARDEN,
Petitioner,

v.

EMMANUEL CHARLES WHITESIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The National Association of Criminal Defense Lawyers (NACDL) submits this brief as amicus curiae with consent of Petitioner and Respondent[1] in support of Respondent Emmanuel Charles Whiteside. Amicus urges that the decision of the United States Court of Appeals for the Eighth Circuit in these proceedings, *Whiteside v. Scurr,* 744 F.2d 1323 (8th Cir. 1984), be reversed in part and affirmed in part.

---

[1]Copies of Petitioner's letter of consent dated July 2, 1985 and Respondent's letter of consent dated June 13, 1985 have been submitted to the Clerk of this Court along with this Brief, pursuant to Sup. Ct. R. 36.2.

INTEREST OF AMICUS

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership comprised of nearly 5,000 lawyers, including representatives of every state. N.A.C.D.L. was founded 26 years ago to promote study and research in the field of Criminal Defense Law, to disseminate and advance the knowlege of the law in the field of Criminal Defense Practice and to encourage the integrity, independence and expertise of criminal defense lawyers. Among N.A.C.D.L.'s stated objectives is the promotion of proper administration of criminal justice. Consequently, N.A.C.D.L. concerns itself with the protection of individual rights, and the improvement of criminal law, its practices and procedures.

The members of N.A.C.D.L. are continuously engaged in the defense of criminal cases statewide and nationwide. The responsibilities of the criminal defense lawyer when faced with the infrequent case of the client perjuror are difficult and complex. The members of N.A.C.D.L. share the philosophy that the Constitution demands and requires that the defense attorney be an independent advocate and that client confidential communications not be used by the advocate to visit substantial harm on the client by this advocate.

Because of the constitutional significance of the issues in this case and because of the nationwide impact this Court's opinion will have on defense lawyers, N.A.C.D.L. respectfully asks leave of the Court to file this brief in support of Respondent in this case.

STATEMENT OF THE CASE

No separate statement of the case will be presented in this amicus brief. The relevant facts and procedural matters are incorporated into the Argument section below.

SUMMARY OF THE ARGUMENT

The law and attorneys' ethics requirements prohibit the knowing use of perjured testimony. Lawyers cannot, however, assess their own clients' credibility and characterize their clients' testimony as perjurious based upon conjecture, surmise, or mere inconsistencies. In this case, there is a serious question whether the defendant's testimony would or would not have been perjurious. Counsel for Emmanual C. Whiteside lacked the "firm factual basis" upon which to predicate this conclusion, which had far-reaching consequences, that his client intended to perjure himself at his own trial. Acting prematurely, counsel threatened to withdraw, to disclose to the judge the details of the suspected perjury, and to testify against the client, should the client testify to the facts which the lawyer concluded were perjurious. The defendant thus truncated his testimony. The fact-finder was deprived of hearing the defendant's full account of his state of mind at the time of the killing which was the only issue raised on the merits of the case. This inappropriate judgment of counsel set up an irreconcilable conflict of interest between the client and the lawyer, ultimately preventing the fact-finder from hearing facts which may have affected their verdict. The multiple threats of defense counsel (to withdraw, inform and testify) forced Whiteside to choose between his right to the effective assistance of counsel and his right to testify on his own behalf. By foisting this Hobson's choice upon Whiteside, counsel abandoned his role

of an advocate and in so doing, deprived Whiteside of both his right to effective assistance of counsel and his constitutional right to testify. The Constitution cannot condone counsel's actions, nor can the courts continue to permit criminal defense lawyers to harm their own clients by revealing confidential communications which fall far short of prospective perjury.

This Court is urged to resolve for criminal defense lawyers the insolvable dilemma of what to do when faced with the perjurious defendant, a situation not necessarily presented by the facts of this case. It is important to the administration of criminal justice that the defense counsel have the right and power to comply with the law on criminal defendant perjury without incriminating his or her client, without incurring the risk of a malpractice suit or a finding of incompetency, and without facing professional discipline and/or criminal charges. Accordingly, Amicus requests counsel, in a client perjury situation, be permitted to withdraw without stating any reasons or disclosing any client confidences if counsel cannot successfully dissuade his client from testifying untruthfully. If the motion to withdraw is denied, counsel should then continue to represent his client as he or she would any other criminal defendant, including full examination of him and full right to argue the client's case in closing. Any other resolution results in the attorney signalling to the judge that perjury is in progress, for which a judge may impose increased penalties, and telegraphing to the jury that the client is a liar. Counsel would effectively be implicating his client in one crime at the very point at which he is to be defending him against another.

This insolvable dilemma should be solved by this Court so that defense lawyers can continue to afford, rather than deprive, their clients of their constitutional rights.

ARGUMENT

I. WHITESIDE'S LAWYER'S ACTS OF PREMATURELY MISLABELLING HIS CLIENT'S TESTIMONY AS PERJURIOUS AND HIS MAKING MULTIPLE THREATS TO WITHDRAW, INFORM THE COURT OF THE DETAILS OF WHITESIDE'S POTENTIAL PERJURY AND TO TESTIFY AGAINST WHITESIDE CREATED AN IRRECONCILABLE CONFLICT OF INTEREST BETWEEN HIMSELF AND WHITESIDE WHICH DEPRIVED WHITESIDE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND THE RIGHT TO TESTIFY.

A. The facts of this case do not establish a firm factual basis for the defense lawyer to conclude that Whiteside was going to commit perjury.

One startling aspect of this case can be overlooked no longer. A serious question exists whether any perjury problem actually is involved in *Nix v. Whiteside;* no canon, code, or case law may support the lawyer's branding of his own client in this case a potential perjuror.

This Court's decision in *Sumner v. Mata,* 449 U.S. 539 (1981) enforcing the habeas corpus statute's "presumption of correctness standard" permits review of this issue by this Court. Although the instant case became a federal matter under 28 U.S.C. § 2254, the factual determination of the Iowa court is "not fairly supported by the record", *Id.* § 2254(d).

Canon 7 of the Model Code of Professional Responsibility (1980) cautions the lawyer to "represent a client zealously within the bounds of the law." The Model Code accordingly, prohibits a lawyer's *knowing* use of perjured testimony. Model Code of Professional Responsibility, DR 7-102(A)(4) (1980) (emphasis added). *Accord,* Model Code of Professional Responsibility, EC 7-26 (1980). The Model Rules of Professional Conduct[2], similarly prohibits

[2]Active study of the Model Rules is underway at the present time in Iowa, but no established date has been set for completion of the study.

similarly prohibits the lawyer from offering evidence he *knows* to be false. Model Rules of Professional Conduct 3.3(a)(4) (1983) (emphasis added). The Comment to Rule 3.3., adopted by the ABA House of Delegates along with the Rule, may indeed exempt from coverage of the Rule the criminal defense lawyer whose client intends to commit perjury. Model Rule 3.3 comment, Constitutional Requirements. The Comment however, also recognizes that the ethical issue arises only when the "accused insists on testifying when the lawyer *knows* that the testimony is perjurious." Model Rule 3.3. comment, Perjury by a Criminal Defendant (emphasis added). The ABA Standards for Criminal Justice: The Defense Function (2d ed. Supp. 1982) Proposed Standard 4-7.7 on client perjury, which for other reasons, was formally withdrawn prior to its submission for approval and never revived, *Id.* at 95, Editorial Note, only operated "[i]f the defendant has admitted to defense counsel facts which establish guilt and counsel's independent investigation established that the admissions are true . . ." Proposed Standard 4-7.7(a). The predecessor ABA Standard 7.7, with a similar provision, was in effect at the time of Whiteside's trial, although it was deleted from the Standards in early 1979.

The cases are in agreement that counsel's ethical duties regarding client perjury are triggered if, and only if, counsel has "a firm factual basis" for the conclusion that the defendant's testimony will be false. *United States ex rel. Wilcox v. Johnson,* 555 F.2d 115, 122 (3d Cir. 1977). In *Wilcox,* the defense attorney "believed" her client would be committing perjury if he took the stand to deny any and all involvement in a rape. Counsel was unable to

---

The ethics provisions of the Iowa Code of Professional responsibility for Lawyers are predicated on the identical corresponding provisions of the ABA Model Code, cited herein.

recall the basis for this belief. *Id.* at 117, 122. No other evidence on the record showed that the defendant would have been a perjurious witness. *Id.* at 122. The court condemned counsel's disclosure of her "private conjectures", *id,* and reminded her that "[i]t is the role of the judge or jury to determine the facts, not that of the attorney." *Id.*

Two years later, a case arose in the District of Columbia Court of Appeals in which the veracity or falsity of the defendant's testimony was also "conjectural". *Johnson v. United States* 404 A.2d 162, 164 (D.C. 1979). The appeals court unequivocally ruled that "the ethical dilemma does not arise" in such a case. *Id.* The trial judge in *Johnson* twice requested proffers from the defense, both before swearing in the jury and after the government rested. Counsel complied, and the proffers regarding defendant's proposed testimony were inconsistent. The court concluded that the second version was perjurious, and directed the lawyer to proceed if at all, with but passive representation of the defendant – to use the narrative device for defendant's testimony and to refrain from arguing his client's testimony to the jury in the closing argument. The defendant chose not to testify. Following his conviction, the appellate court ruled that the trial court unconstitutionally and impermissibly imposed its restrictions on counsel. *Id. The court noted that "counsel did not believe his client's intended testimony would be perjurious and we are unable to conclude that the evidence warrants a contrary conclusion." Id.* at 165. The court said that the inconsistency between the defendant's two proferred defenses was insufficient to establish a perjurious intent on his part, *id.* at 164, and the trial court's contrary conclusion was based on "surmise". *Id.* Accordingly, the case was reversed and remanded for a new trial.

The District of Columbia Court of Appeals thus

distinguished, in 1979, between conjecture, surmise and conclusions drawn from inconsistent defense statements, on the one hand, and, on the other, actual knowledge of projected perjury based on a defendant's admissions and an attorney's independent investigation. *See id.*, and cases cited therein. In 1980, the same court again ruled, in *Butler v. United States,* 414 A.2d 844, 850-51 (D.C. 1980), that counsel does not *know* his client will commit perjury simply based on a client's inconsistent representations to his lawyer.

More recently, in 1982, the Superior Court of Pennsylvania, in *Commonwealth v. Wolfe*, 301 Pa. Super. 187, 447 A.2d 305, 310-11 (1982), joined the ranks of the courts requiring that counsel know "for a fact", "know for sure" that his client will present perjurious testimony in this type of situation. "He must not merely suspect it." *Id.* at 310 n.7. Instead, in *Wolfe*, "once the lawyer decided that the proposed . . . testimony was false, he threw up his hands and abandoned the attempt to defend his client." *Id.* at 311.

In sum, as the Third Circuit stated in *United States ex rel. Wilcox v. Johnson,* 555 F.2d at 122:

> It is apparent that an attorney may not volunteer a mere unsubstantiated opinion that his client's protestations of innocence are perjured. To do so would undermine a cornerstone of our system of criminal justice.

In the case at bar, the lawyer did not actually disclose to the Court his projection that perjury would occur at trial; instead, the lawyer effectively kept out the questionable testimony by threatening his very own client with the specter of the lawyer's withdrawal, disclosure to the Court of the suspected perjury, and appearance as an adverse wit-

ness at trial. *Whiteside v. Scurr,* 744 F.2d 1323, 1326 (8th Cir. 1984). This was not necessarily a case in which a lawyer "nip[ped] perjury in the bud," *Whiteside v. Scurr,* 750 F.2d 713, (8th Cir. 1984) (denial reh'g en banc) (Fagg, J., dissenting). Rather, this is a case in which a lawyer prematurely presumed perjury and unnecessarily turned himself into his client's adversary instead of his advocate. The facts show[3]:

Emmanuel Charles Whiteside was charged with murder for the 1977 stabbing death of Calvin Love. During an argument in Love's apartment, at which two of Whiteside's friends and Love's girlfriend were present, Whiteside stabbed Love as Love was moving toward him. Whiteside's defense was that Love had been reaching for a gun beneath a pillow, and that Whiteside acted in self-defense. Whiteside told his lawyer he had not actually seen a gun, but that he thought he had[4] and that he was convinced Love had a gun, based on Love's reputation for carrying a gun. The others at the argument said they had seen no

---

[3]The factual rendition in this brief is based on the Eighth Circuit's reporting of the facts.

[4]The Iowa Supreme Court incorrectly concluded that Mr. Whiteside had some "dishonest and deceitful scheme", *State v. Whiteside*, 272 N.W. 2d 468, 471 (Iowa 1978), based in part on defendant's statement that he had to testify that Love had a gun if he hoped to be acquitted. His lawyer, however, explained the law to Whiteside, to appease his anxiousness, by assuring him that the gun itself was not essential to the defense of self-defense, that the defense would be successful if the jury found that Whiteside reasonably believed Love had had a gun. 744 F.2d at 1325-26. The Iowa court, like defense counsel, however, concluded that defendant intended to testify that he had seen a gun, when he had earlier told counsel he had not. The record does not support that conclusion; there was nothing infirm about defendent's later recollection of a metallic object, an object he never claimed indeed to have been a gun. *See* argument, *infra.*

gun, but Whiteside's friends said they, too, believed Love probably did have a gun. Several hours after the stabbing, Love's girlfirend and family broke into the apartment and removed everything. Counsel learned of this private, surreptitious search during the course of his "investigation." It is not then surprising that a quick police search and counsel's own search uncovered no gun, nor that the apartment manager also found no gun. Further, no independent investigation conducted by counsel uncovered any fact(s) to support his surmise that Emmanuel C. Whiteside would lie under oath. If anything, counsel's investigaiton, which uncovered the fact of the girfriend and family's forced entry and emptying of Love's apartment, support Whiteside and his friends' belief that Love indeed had a gun in his home that day.

Counsel created the factual problem when, shortly before trial, Whiteside told him that he had seen something metallic in Love's hand just before the stabbing. The Eighth Circuit called this a "discrepancy," 744 F.2d at 1326, but indeed it is not.[5] Whiteside had earlier told his

---

[5]In the denial of rehearing en banc, from which four judges dissented, one dissenting judge's opinion cited the Iowa Supreme Court's decision affirming the conviction. The fact that the defendant said that during the argument Love told his girlfriend to get his "piece" (gun), was said to "refute defendant's claim Love already had one." *Whiteside v. Scurr*, 750 F.2d 713, 715 (8th Cir. 1984) (Gibson, J., dissenting), quoting *State v. Whiteside*, 272 N.W. 2d 468, 471 (Iowa 1978). On the contrary, however, Whiteside had told his lawyer "he saw something metallic in Love's hand *just before the stabbing*." 750 F.2d at 715 (emphasis added). These two statements are not necessarily contradictory; Love could have told his girlfriend to get his "piece", then moved towards the pillow and for the gun (or some metallic object), himself just before Whiteside reacted in self-defense. At most, the defendant's statements are merely inconsistent, *see supra*, but the lawyer's conjectural conclusion was that his client was a would-be perjuror, a conclusion which is unsupported on these facts and under the

lawyer that he had not actually seen a gun, but that he had thought he had. He never contradicted this statement; he never said he had seen a gun. The metallic object, whatever it may have been, may well have been the reason, was certainly one of the reasons, why Whiteside, in is mind's eye, thought he had seen a gun at the time Love was moving toward him. Yet his lawyer apparently interpreted the recalled information regarding a metallic object to mean Whiteside was newly claiming he had actually seen a gun. At worst, Whiteside had made inconsistent statements;[6] on that basis, his lawyer stopped him from testifying about the metallic object. The lawyer's threats thus impermissibly curtailed the defendant's testimony; the jury found Mr. Whiteside guilty of murder in the second

---

law. Note also that both the Iowa court and the dissenting opinion on rehearing cited above omit the significant fact that Love's girlfriend and family broke into and removed everything from his apartment within several hours of the incident; the two opinions do not mention that a search of the apartment shortly after Love's death disclosed no gun, a fact which – unfairly standing alone – is more damaging than when viewed in context, if indeed it is truly relevant to the issue of Whiteside's *belief* that there had been a gun.

[6]Inconsistent statements are commonplace occurrences in our courts. Such statements occur daily and are not intentional falsehoods but result because human perceptions are subjective, sometimes incorrect and sometimes influenced by the emotion of events. Trial attorneys are all too frequently surprised by the actual testimony of a client or a witness because it differs in some respect (a detail remembered or forgotten) than had been anticipated. This, however, is a far cry from saying the testifier will deliberately swear to a fact known to be false which is what Whiteside's lawyer concluded that Whiteside was doing.

degree, and the judge sentenced him to forty years in prison.[7]

In its opinion, the Eighth Circuit accurately observed, with regard to the "firm factual basis" which counsel must first have before the client perjury problem actually arises: "[i]t will be a rare case in which this factual requirement is met." 744 F.2d at 1328. The instant case is not, and never was, such a case. The defendant never admitted his guilt, nor any of acts which unquestionably showed guilt, nor did counsel's own investigation uncover anything to contradict his client's confidential communications. Yet, instead of remembering that he was to be his client's advocate, *id.*, counsel became the trier of fact; he judged his client's credibility, then improperly and irretrievably threw down the gauntlet with the spear of his multiple threats.

The Eighth Circuit erred, *see id.*, in presuming that the defendant would have testified falsely. Mr. Whiteside deserves a new trial in a different courtroom with different counsel – someone willing to represent him zealously within the bounds of the law.

---

[7]The facts appear to lend credence to Whiteside's claim that he had a reasonable belief that Love was reaching for a gun and reacted to save his own life:

1. Love had a reputation for carrying a gun.
2. Witnesses to the killing believed that Love had a gun.
3. The police conducted only a quick search of the apartment for evidence.
4. Love's family and friends had broken the police padlock and removed all personal items from Love's apartment.

B. Whiteside's lawyer's actions of labelling his client's proposed testimony as perjurious and his making multiple threats to withdraw, inform and testify against Whiteside created a conflict of interest impairing the accuracy of the fact finding process and shattering the attorney-client relationship, which violated Whiteside's right to effective assistance of counsel.

1. Requirements of due process of law and effective assistance of counsel dictate that the criminal defense lawyer perform the role of an advocate and not that of a judge of his own client.

The Sixth Amendment requires defense counsel to protect and not to deprive the accused, the client, of his or her constitutional rights. When placed in a conflict position between lawyers' ethics and the client's constitutional rights the lawyer must act to ensure and afford the client's rights. The Eighth Circuit aptly observed:

> As the ABA Model Rules 3.3 comment, appendix B, states, the Constitution prevails over rules of professional ethics, and a lawyer who does what the sixth and fourteenth amendments command cannot be charged with violating any precepts of professional ethics.

Whiteside v. Scurr, 744 F.2d 1323, 1327 (8th Cir. 1984) (appendix omitted).

Our system of justice is built upon the advocate's independence and responsibility to advocate:

> A man's rights are to be determined by the Court, not by his attorney or counsel. It is for want of remembering this that foolish people object to lawyers that they will advocate a case against their own opinions. A client is entitled to say to his counsel, "I want your advocacy, not

> your judgment; I prefer that of the Court." *Johnson v. Emerson,* L.R. 6 Ex. 329, 367 (1871).

The Court has focused, as recently as last year, in *Strickland v. Washington,* 466 U.S. ____, 104 S.Ct. 2052 (1984) on the key role of the criminal defense lawyer in the fair and effective operation of the adversary system. The fair trial right, guaranteed through the Due Process clauses, is, in part, defined by the Sixth Amendment right to counsel and encompasses the defendant's fundamental right to testify in his own defense.

In the *Strickland* case, this Court recognized that "[r]epresentation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." 466 U.S. at ____, 104 S.Ct. at 2065.

Canon 7 of the Model Code of Professional Responsibility (1980) similarly requires the defense lawyer to act as a zealous advocate for his client. Canon 4 accordingly cautions the lawyer to preserve the confidences and secrets of a client. DR 7-102(B) of the Model Code exempts a lawyer from revealing a fraud perpetrated by his client upon a tribunal "where the information is protected as a privileged communication." The Model Rules of Professional Conduct (1983), approved and adopted along with corresponding Comments by the ABA House of Delegates, though not yet formally adopted in Iowa, addresses, through the Comment to Model Rule 3.3, an even broader exemption of the criminal defense attorney from disclosure of client perjury:

> The general rule — that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client — applies to

> defense counsel in criminal cases, as well as in other instances. However, the definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement.

Model Rule 3.3 comment, Constitutional Requirements.[8] Thus, again, the ethics requirements lead the Court back to the Constitution, to the due process, effective assistance of counsel, and right to testify protections which distinguish the criminal defendant from any other witness.

In *United States ex rel. Wilcox v. Johnson,* 555 F.2d 115 (3d Cir. 1977), the court denounced [a criminal defense] attorney's unnecessary disclosures of the confidences of his client, stating that it "creates a chilling effect which inhibits the mutual trust and independence necessary to effective representation." *Id.* at 122. In the *Wilcox* case, counsel informed the judge, in a jury trial, of her client's (supposed) proposed perjury. The judge ruled that, if the defendant insisted on testifying as counsel had warned he would, counsel would be permitted to withdraw from the case, and the defendant would have to represent himself. This ruling, the appellate court held, impermissibly infringed both the defendant's right to testify and his right to the effective assistance of counsel. *Id.* at 120.

---

[8]Standards for Criminal Justice: The Defense Function, Proposed Standard 4-7.7 also precluded counsel from disclosing client perjury to the court. *See infra,* however, regarding non-existence of any Standard on client perjury since early 1979.

The following year, in *Lowery v. Cardwell,* 575 F.2d 727 (9th Cir. 1978), the Ninth Circuit Court also found a deprivation of due process in a client perjury case. In a bench trial, defense counsel abruptly ceased questioning the defendant on the stand and moved to withdraw, in chambers, refusing to state his reason. The withdrawal motion was denied; counsel asked no further questions of his client and argued the case without referring to the suspect testimony by the accused. The court ruled that counsel, by his actions, informed the trial judge of his belief that his client was a perjuror, thereby precluding a fair trial on the merits of the case, and openly placing himself in opposition to his client. *Id.* at 730. Thus, though counsel had not said a word to the court, his actions deprived the defendant of a fair trial. *Id.* The court condemned "such direct action as we find here, the addressing of the court in pursuit of court order granting leave to withdraw . . . conduct affirmatively and emphatically call[ing] the attention of the fact finder to the problem counsel was facing." *Id.* at 731. The court concluded, unhappily, that "fundamental requisites of fair trial have been irretrievably lost." *Id.* See also *Butler v. United States,* 414 A.2d 844 (D.C. 1980) (counsel's disclosure to trier of fact of client's intended perjury deprived defendant of due process).

Circuit Judge Hufstedler specially concurred in the *Lowery* case. 575 F.2d at 732. The judge did not disagree with the majority's due process analysis, but rested her opinion on the deprivation of the Sixth Amendment right to effective assistance of counsel. Judge Hufstedler stated:

> [W]hen defense counsel moved to withdraw, he ceased to be an active advocate of his client's interests. Despite counsel's ethical concerns, his actions were so adverse to petitioner's interests as

to deprive her of effective assistance of counsel. No matter how commendable may have been counsel's motives, his interest in saving himself from potential violation of the canons was adverse to his client, and the end product was his abandonment of a diligent defense.

2. *The conflict of interest between the client (Whiteside's right to convey his full state of mind to the jury as he remembered it) and the lawyer (counsel's fear of personal consequences unless he forfeited Whiteside's right to tell the jury his full state of mind) was real, clear and constitutionally impermissible.*

Petitioner argues that Whiteside's lawyer had no actual conflict of interest and that no lapse of advocacy occurred affecting the adequacy of Whiteside's representation. (Brief of Petitioner, pp.20-23). This view of the record begs the constitutional question before the Court. Whiteside possessed a due process right to testify in his own defense. *Faretta v. California,* 422 U.S. 806, 819 N.15, (1975); *Brooks v. Tennessee,* 406 U.S. 605, (1972); *Harris v. New York,* 401 U.S. 222, 225, (1971); *In re Oliver,* 333 U.S. 257, 273, 275, (1948). Whiteside claimed that he acted in self-defense. The killing was witnessed by three persons and Whiteside admitted by his claim of self-defense that he caused Love's death. The only issue left for the fact-finder was to determine the actor's, Whiteside's, state of mind at the time of death – i.e. whether Whiteside possessed a reasonable belief that Love was going to kill him or do serious bodily harm at the time Whiteside acted in self-defense. Whiteside's fate hung on the jury determination of this issue and depending on its finding on this issue Whiteside could have been convicted or acquitted of any of a series of crimes ranging from first

degree murder (possessing an intent to kill, plus a state of mind of premeditation) or completely exonerated, acquitted (possessing "a reasonable belief that Love was going to kill or seriously harm him.")

Whiteside's pretrial statement to his lawyer that he saw something metallic in Love's hand just before the stabbing, is a critical and crucial part of his state of mind which was omitted from consideration by the fact-finder. Because another witness stated that Love told his girlfriend to get his "piece", [meaning his gun] does not mean that, in fact, Whiteside did not believe that Love had a weapon or that Whiteside did not, in fact, see something metallic in Love's hand [not a gun] before the stabbing. (See discussion, *infra* Section 1A, Footnote 5). Certainly, this additional fact could have been argued by the prosecution as being inconsistent with what the other witnesses said and inconsistent with the police search of Love's apartment. However, defense counsel for Whiteside could have argued that the words of Love to get his piece occurred before Love, in fa. ached under his pillow and grabbed his gun, or that Love had told his girlfriend to get his "piece" as a diversionary tactic so that he could proceed to shoot Whiteside as Love reached under his pillow to get his gun. Viewed from Whiteside's perspective the jury was denied the opportunity to consider this fact which was critical to his state of mind at the time of the killing.

When defense counsel engaged in multiple threats, and in particular when he told Whiteside that he was going to testify against Whiteside should Whiteside testify that he saw something metallic in Love's hand he became not a potential but a real and direct adversary to his client. The lawyer admitted at post-conviction hearings that he, as an attorney, could not ethically permit Whiteside to testify about the metallic object because he ". . . would be sub-

orning perjury . . ." [Pet. App.85]. The defense lawyer was concerned about his own involvement, facing possible criminal prosecution and defending himself in professional disciplinary proceedings. Unfortunately, defense counsel's hasty and premature judgment of his client's prospective testimony caused this irreconcilable conflict of interest. This conflict was not potential, but clear and apparent; it existed between the lawyer concerned about possible professional and personal recriminations against himself and the defendant who wanted to testify to the facts of the killing as he then remembered them.

It is difficult to imagine a more substantial conflict of interest between lawyer and client than this case: the defense lawyer volunteered to testify as a witness for the prosecution against his client concerning his client's confidential communications in the very case in which he had the duty to represent the client. Notions of client trust, loyalty and confidence between lawyer and client vanish. The defense lawyer was transformed from advocate to adversary when he said, "I am going to tell the Court and the jury that you are a liar." The attorney-client relationship was destroyed. And worse yet, as occurred in this case, the fact-finder was deprived of information necessary to a full and fair adjudication of Whiteside's claim of self-defense.

3. *The conflict between client and lawyer presumptively constitutes prejudice which denied Whiteside his right to effective assistance of counsel.*

In the opinion below, the Eighth Circuit adopted the appropriate test for prejudice in dealing with effective assistance of counsel claims as clarified by this Court in *Strickland v. Washington, infra:*

> "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally

> presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. . . . The Court further noted that ineffective assistance of counsel claims that involved conflict of interest warranted "a similar, though more limited, presumption of prejudice . . . . Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and 'that an actual conflict of interest adversely affected his lawyer's performance.' " 104 S.Ct. at 2067, *citing Cuyler v. Sullivan,* 446 U.S. 335, 348, 350, (1980) (footnote omitted)

Whiteside v. Scurr, 744 F.2d at 1330.

The application by the Eighth Circuit of the limited presumption of prejudice was appropriate in this case because, in fact, there existed a serious conflict of interest between Whiteside and his lawyer which went to the heart of the reliability and accuracy of the fact-finding process. Whiteside offered abridged testimony solely because his own lawyer feared for the consequences that might personally befall him [possible criminal prosecution and professional disciplinary proceedings]. The conflict here was just as real as the conflict of interest discussed by this Court in *Cuyler v. Sullivan,* 446 U.S. 735, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980). In both cases because of conflicting interests between themselves and their clients, defense lawyers prevented potentially exculpatory evidence from being introduced at trial on behalf of the client. Whiteside's defense lawyer chose to place his own interests over those constitutional rights guaranteed his client when he foreclosed Whiteside's full testimony on the major issue in this case. Advocates should not place themselves in such direct conflict positions with their clients. Due process

standards do not permit the advocate to forfeit basic and fundamental constitutional rights of the accused as occurred in this case, and therefore, Amicus urges adoption of the limited presumption of prejudice when viewing the ineffective assistance of counsel claim presented by this case.

4. *In cases which pose the perjurious client problem it should be unconstitutional to require or allow the defense lawyer to forfeit his own client's fundamental right to testify.*

The perjurious client dilemma is a very real but infrequently seen problem faced by defense lawyers nationwide. As argued in Section IA., Whiteside's attorney created this dilemma when it appears not to have clearly existed. Some decisions confuse notions of the lawyer's role and the defendant's right to testify when faced with this problem. In *United States v. Curtis,* 742 F.2d 1070 (7th Cir. 1984) the Seventh Circuit held that the defense lawyer did not render ineffective assistance of counsel when he refused to allow the defendant to testify perjuriously in a robbery prosecution. In post-conviction proceedings, the defense lawyer testified that in pretrial conferences the defendant admitted his participation in the robbery and intended to testify to an alibi. Holding that the defendant has a fundamental constitutional right to testify as a matter of due process of law the court ruled that this right may be exercised by the accused with the exception of the situation in which the accused intended to testify falsely. The Court reasoned that there is no constitutional right to testify "perjuriously in his own behalf." *Id.* at 1076.

Based on the rationale of *Curtis* Petitioner urges this Court to require the defense lawyer to take affirmative steps which effectively incriminate and harm the client.

Without doubt, *Curtis* poses the most difficult problem for the defense lawyer when the client squarely and clearly indicates that perjury will be committed.

Curtis' holding appears reasonable and convincing if its assumptions are not carefully analyzed. It is certainly true, and it is hard to argue with the abstract proposition expressed in *Harris v. New York,* 401 U.S. 222,. 225 (1971), that the defendant has no right to commit perjury. This statement does not mean, as *Curtis* holds, that if a client intends to testify perjuriously, (the "perjury" conclusion being that of the lawyer), that the defendant should be foreclosed from exercising the fundamental right to testify. This phrase as applied in *Harris, infra,* means that if a defendant testifies to matters which are inconsistent with prior statements obtained in violation of his due process rights, then he may be cross-examined, using those unconstitutionally obtained statements. In addition, this phrase means that if the defendant testifies falsely at his trial, then the fundamental right to testify will not operate as a constitutional shield precluding prosecution for perjury, nor will the constitutional right to testify preclude the court's enhancement of his sentence if the Court believes that the testimony was perjurious. *See, United States v. Grayson,* 438 U.S. 41, 50 (1978). Both perjury prosecution and sentence enhancement are appropriate remedies for false testimony.

If the proposition that the defendant has no right to commit perjury is applied to situations *before* the defendant in fact testifies, then defense counsel is placed in an unconstitutional conflict of interest position with the client. Defense counsel is forced to make the final judgment about whether a client is going to commit perjury. Effectively, in making this judgment, defense counsel, and

not the client, is making the determination of whether the client will forfeit his fundamental right to testify. Further, Petitioner argues that it is appropriate for defense counsel to inform the court of the intended perjury and threaten to testify against the client should the client insist on testifying falsely. All of these actions place the lawyer squarely in the role of judge, far beyond the role of an advocate, and force the lawyer to be an adversary of his client. The conclusion and judgment that the client's testimony *was* perjurious must be made by participants of the criminal justice system, *e.g.*, the prosecution, the courts, and law enforcement, and not by the accused's own advocate, his or her lawyer.[9]

By urging this court to adopt a constitutional standard articulating the role of the defense counsel as an advocate with respect to the perjurious client dilemma, Amicus does not mean to suggest (1) that defense counsel do anything which encourages a defendant to testify falsely, or (2) that defense counsel should in any fashion refrain from expressing to the client negative and critical assessments with respect to his or her clients' testimony. The concept of reasonably competent assistance of counsel certainly includes the obligation of the criminal defense lawyer to assess realistically the impact of the client's proposed testimony. Advice of counsel, however, should not and must not include the power to forfeit the client's right to

---

[9]As a practical matter this judgment, except in the rarest of cases, is virtually impossible to make. The facts of *Whiteside* serve to show how hard a judgment it is – the demarcation between a new honest recollection of a past event and one fabricated for the purpose of testifying falsely is, at best, difficult to distinguish. The requirements that the defense advocate make this distinction place a judicial responsibility on the part of the defense lawyer which should not be his or hers.

testify. As is discussed in more detail in Section II of this Brief, defense counsel has the professional duty to dissuade and persuade the client who intends to testify falsely and then, if unsuccessful, to move to withdraw from representation. However, when the advocate is forced to judge the truthfulness of a client's intended testimony, the attorney-client relationship is shattered, the client's constitutional rights are impaired and the independence of one of the three branches of the adversary system – defense counsel, is significantly eroded in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

II. THIS COURT SHOULD GUIDE THE CRIMINAL DEFENSE ATTORNEY FACED WITH CLIENT PERJURY IN ORDER TO GIVE THE LAWYER THE RIGHT AND POWER TO COMPLY WITH THE LAW WITHOUT THE RISK OF HARMING THE CLIENT, INCURRING A MALPRACTICE SUIT OR A FINDING OF INCOMPETENCY.

The perjurious client dilemma does not arise often,[10] but when it does, it is one of, if not the most difficult, situations in the practice of criminal law.[11] Lawyers are caught between difficult-to-discern ethical responsibilities, *see*

---

[10]See argument 1., *supra; Whiteside v. Scurr*, 744 F.2d at 1328.

[11]A solution to the perjurious client problem is currently nonexistent. Many commentators have debated the dilemma, beginning nearly twenty years ago. *See*, Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966). A decade later, another law review piece, Wolfram, *Client Perjury*, 50 So. Cal. L. Rev. 809 (1977) collected dozens of authorities on the debate. Dozens more exist today. *See, e.g.*, Rotunda, *The Notice of Withdrawal and New Model Rules of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 Or. L. Rev. 455, 455-56 n.2 (1984).

supra, the representation of a client (like no other client, no other witness, in any other type of case) with the right to testify. *See Wainright v. Sykes,* 433 U.S. 72, 93 n.1 (1977) (Burger, J., concurring); *Whiteside,* 744 F.2d at 1329-30 (and cases cited therein), and constitutional constrictions on counsel's words and actions, imposed by cases like *Whiteside, Lowery,* and *Wilcox.*

Defense lawyers are in need of guidance and protection from this Court when faced with this dilemma.[12] The need is particularly acute for court-appointed counsel who may lack the economic clout of the retained attorney who is able to prevent false testimony by the threat of withdrawal. If the defense lawyer follows the narrative technique and abridged closing argument recommended by the former Defense Function Standard 7.7 and its proposed successor standard 4-7.7 he or she effectively labels client a perjurer to both judge and jury.[13] This is a treacherous course for the defense lawyer to follow because the client may receive an enhanced sentence if convicted; (In *Grayson, infra,* 438 U.S. 41, 50, this Court approved an increased sentence because "truthfulness or mendacity . . . has been deemed probative of . . . prospects for rehabilitation"). Further, depending upon the circumstances, the

---

[12]This discussion assumes that the defense counsel does "know" that his client's proposed testimony will be perjurious because "the defendant [has] admitt[ed] incuplatory facts to his lawyer which are corroborated by the lawyer's own investigation." Defense Function Standard 7.7(a) commentary (withdrawn, 1979).

[13]Both ABA standards prohibit the lawyer from revealing the intended perjury to the court when counsel moves to withdraw. Proposed Standard 4-7.7 made explicit what was implicit in the original Standard 7.7 that where the lawyer seeks to withdraw "the court should *not* be advised of the lawyer's reason for doing so." ABA Project on Standards for Criminal Justice, *The Prosecution and the Defense Function,* Proposed Defense Function Standards 4-7.7(b) at 95.

lawyer may be sued for malpractice or be the subject of a judicial finding of incompetence.

If the defense lawyer follows the approach suggested by the ABA Amicus Brief in this case, which urges the defense lawyer to inform the Court of the details of the intended perjury, his vulnerability is greater in degree and obviously, worse, than if he follows the former ABA approach.[14] Under either course of action, the old ABA or

[14]N.A.C.D.L. is concerned that the ABA Amicus Brief may mislead this Court with respect to ABA policy on the very important issue posed by this case:

1. N.A.C.D.L. submits that the ABA has *no* policy on the critical issue which must be decided in this case: whether the actions of defense counsel denied his client effective assistance of counsel and due process of law.

2. The Model Rules of Professional Conduct in its Commentary to Model Rule 3.3 clearly indicates that in criminal cases when counsel is faced with the perjurious client dilemma, the model rules which require disclosure of client perjury *may* be subordinate to the advocate's duty under the Constitution:

   The definition of the lawyer's ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. In some jurisdictions, these provisions have been construed to require that counsel present an accused as a witness if the accused wishes to testify, even if counsel knows the testimony will be false. The obligation of the advocate under these Rules is subordinate to such a constitutional requirement. *Model Rules of Professional Conduct and Code of Judicial Conduct* at 67 (1983).

3. The Proposed Final Draft of model Rule 3.3 makes even more clear the Rule was not intended to resolve the constitutional issue under consideration in this case. At the outset of the commentary, the Proposed Final Draft states in underlined, boldfaced capital letters: CAVEAT: CONSTITUTIONAL LAW DENYING THE RIGHT TO ASSISTANCE OF COUNSEL IN CRIMINAL CASES MAY SUPERSEDE THE OBLIGATIONS STATED IN THIS RULE.

   Proposed Final Draft: Model Rules of Professional Conduct at 125 (May 30, 1981).

the approach urged by the ABA amicus brief, if a defense lawyer, by verbal or non-verbal acts reveals or in any way refers to his own client's readiness to commit non-verbal acts reveals or in any way refers to his own client's readiness to commit perjury or the commission of perjury, he actively and effectively subjects the client to an enhanced penalty in the very case in which he is supposed to be acting on the client's behalf. He or she may also be sued for malpractice and run the risk of a finding of incompetency.

If the defense lawyer follows the approach recommended by Professor Freedman[15] then counsel may be the subject of formal disciplinary proceedings and/or accused of a crime.

In view of the conflicting constraints and consequences, this Court is urged to solve the heretofore insolvable matter of how a defense lawyer should react to a client who intends to perjure himself. As Judge Gibson, who dissented from the denial of rehearing en banc in *Whiteside* observed:

> The majority does not discuss the proper course for the lawyer in the position faced by Whiteside's counsel, which presents an extremely complex question. We should not attempt to resolve this issue in separate opinons. Consideration of counsel's dilemma is further reason for rehearing en banc, particularly in view of the conflicting academic discussions of this question. *See, Whiteside,* 744 F.2d at 1327.

Whiteside, 750 F.2d at 716 (Gibson, J., dissenting).

Accordingly, this Court is asked to adopt the following guidelines which approve conduct for the defense lawyer when faced with the rare situation of client perjury:

---

[15]See citations in footnotes 11, 17 and 19.

(a) After the lawyer has been unsuccessful in dissuading the client from taking the stand to commit perjury the lawyer may seek to withdraw if and only if, by words and non-verbal acts,[16] the lawyer conveys no hint of the underlying reason for the withdrawal.[17]

(b) Disclosure of client communications, indeed of any client intent to perjure, is prohibited as it is at all odds with a criminal defendant's constitutional rights and the constitutional role of the advocate, (*see* argument I.B., *supra*,) and results in the lawyer visiting actual harm upon the individual he or she is charged with representing.[18]

(c) Should the trial court deny leave to withdraw, the lawyer should be permitted to proceed and represent the client as in any other case — with full right to question the accused on direct examination and with no prohibition

---

[16]*See Whiteside,* 750 F.2d at 717 n.2 (Lay, C.J., concurring). Judge Lay recognized that "non-verbal acts may, in some circumstances, inform the court that the client is intending to give false testimony", *id* citing *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978). Judge Lay concluded, however, that "[w]ithdrawal before trial, or when feasible, without advising the trial judge of the particulars of the situation, normally will not constitute an 'unequivocal announcement' depriving a defendant of his or her constitutional rights." *Id.,; Cf. State v. Lee,* 142 Ariz. 210, 689 P.2d 153 (1984) (suggesting withdrawal motions when necessary in the perjurious witness situation be made simply on the basis of irreconcilable conflict).

[17]*But see Lowery, supra*, in which the very act of withdrawal caused constitutional error. Withdrawal has been criticized, however, not only for signalling the judge that perjury is to occur, but because its end result, at best, is passing along the client to lie to the successor attorney. *See, e.g.*, Freedman, *Lawyer's Ethics in an Adversary System* at 33 (1975).

[18]*See Grayson, supra.*

against presenting argument of any fact in the record on summation.[19]

The narrative procedure ("tell your story to the jury, Mr. Defendant") and the abridged closing argument are techniques which decidedly destroy the non-disclosure principle; these suggested modes of proceeding with perjured testimony effectively telegraph to judges and juries that the lawyer believes, and knows, his client is a liar.[20]

It is considered unethical for a lawyer to express a "personal belief or opinion in his or her client's innocence," Defense Function Standard 4-7.8(b), and likewise it is considered unethical for the prosecutor "to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence on the guilt of the defendant." Prosecution Function Standard 3-5.8(b). The narrative approach and prohibition preventing argument of the client's testimony violate these professional standard norms which apply to criminal adversaries alike. Similarly, limiting counsel's closing argument prohibits counsel from performing the responsibility of advocacy to the client in summation which requires her or him to "argue all reasonable inferences from the evidence in the record," Defense Function Standard 4-7.8(a) and Prosecution Function Standard 3-5.8(a). The deletion and withdrawl of the Defense Function Standard 7.7(a) was based upon the sound conclusion that these techniques for dealing with the perjurious client problem caused as many problems as they were thought to

---

[19]*See, e.g., Coleman v. Alaska,* 621 P.2d 869, 878, 881-82 (Alaska 1980), *cert. denied,* 454 U.S. 1090 (1981); *Freedman, supra* at 40-41; Comment, *Confidentiality and the Lawyer's Conflicting Duty,* 27 How. L.J. 329, 343-44 (1984).

[20]*See, e.g., State v. Lee,* 142 Ariz. at 219, 689 P.2d at 162 n.4; Vickrey, *Tell It Only to the Judge: Disclosure of Client Confidences Under the ABA Model Rules of Professional Conduct,* 60 N.D.L. Rev. 261, 270-72 (1984).

solve. It is important to note that any case decided after the early part of 1979, which relies on these standards as official policy, does so in error.

It is time that criminal defense attorneys receive meaningful guidance, internally consistent direction they can follow in this complicated situation. No one favors or seeks to promote perjury, but a perjuror can be punished by the court before whom he commits the act, or under state and federal laws proscribing it.[21] The defense lawyer should not and need not be required to act adversely to his client's very rights and interests and abandon the constitutionally supported role of an advocate in order to protect his or her own position in our criminal justice system.

CONCLUSION

Based on the foregoing arguments and authorities, this Court is respectfuly requested to reverse the decision of the United States Court of Appeals for the Eighth Circuit to the extent that it presumes perjury would have occurred in the trial court but for counsel's theats against his own client, and remand the case for a new and fair trial. Alternatively, this Honorable Court is requested to affirm the result ordered by the Eighth Circuit that Emmanuel Charles Whiteside's lawyer deprived him of due process, effective assistance of counsel, and the right to testify by threatening to withdraw, disclose any projected perjury to the judge, and become a witness for the prosecution.

---

[21] *See Whiteside*, 744 F.2d at 1328.

Further, this Court is strongly urged to adopt guidelines as suggested for the defense lawyer who is in fact faced with the client perjury problem.

Respectfully submitted,

BENDER & TREECE, P.C.

By: _____

Michael L. Bender
1900 Grant Street, Suite 700
Denver, Colorado 80203
(303) 534-33015

LYONS & SANDERS
Bruce M. Lyons
600 N.E. 3rd Avenue
Fort Lauderdale, Florida 33304
(305) 467-8700

(Counsel for Amicus Curiae)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 1985, I did place the following "Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Respondent," in the United States mail, postage prepaid, and properly addressed as follows:

Brent R. Appel, Esq.
Deputy Attorney General
Department of Justice
Hoover Building
De Moines, Iowa 50319

Patrick R. Grady, Esq.
Linn County Public Defender
214 First Street, S.W.
Cedar Rapids, Iowa 52404

/s/
Michael L. Bender